COMMENTS

BREACH OF EMPLOYEE CONFIDENTIALITY: MOVING TOWARD A COMMON-LAW TORT REMEDY

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INTRODUCTION

Scenario 1: A woman tries to distance herself from a harassing former lover who has violent tendencies. She moves to a new location and obtains an unlisted telephone number. Her former lover contacts her employer, who—unaware of the situation—discloses her address and telephone number. With knowledge of this information, the former lover resumes harassment.[1]

Scenario 2: A parent is curious about the character of her daughter's fiancé. She hires an investigator to perform a "background check." Through the fiancé's employer, the investigator discovers that he has a criminal record and has child support payments deducted from his wages. The engagement is broken as a result.[2]

Scenario 3: An individual is seriously injured while on the job and receives worker's compensation benefits. Her employer discloses her name and social security number to a computer database service which tells subscribing employers whether job applicants have ever received worker's compensation benefits in the past. She now has extreme difficulty finding another job.[3]

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[1] *Cf.* Webb v. City of Shreveport, 371 So. 2d 316, 319 (La. Ct. App. 1979) (stating that employee has no reasonable expectation of privacy regarding employer disclosure of employee address).

[2] *Cf.* Baker v. Burlington Northern, Inc., 587 P.2d 829, 833 (Idaho 1978) (holding that employer's disclosure of employee's criminal record was not actionable).

[3] *See* JEFFREY ROTHFEDER, PRIVACY FOR SALE: HOW COMPUTERIZATION HAS MADE EVERYONE'S PRIVATE LIFE AN OPEN SECRET 153-57 (1992). Rothfeder discusses the Employer's Information Service, Inc. ("EIS"), a database company

As these three scenarios illustrate, employers have access to highly sensitive information. This information not only concerns employment matters (such as wages, working hours, and seniority), but also concerns details about an employee's living arrangements, physical and mental health, and other highly personal matters. An employee's personnel file is perhaps more comprehensive and revealing of her life than any other source of information. Yet, most are surprised to discover that there is no legal remedy when a private employer discloses true information about its employees to third parties.[4]

With the increasing ease of information storage and retrieval, the potential for information misuse is growing.[5] Despite this trend, however, courts and legislatures have done little to assure the confidentiality of personal information in the workplace.[6] Absent a collective bargaining agreement, private sector employees must rely entirely on the goodwill of their employers to keep their records secure.[7] Perhaps this problem could be addressed effectively through legislation.[8] The courts, however, need not wait for such a mandate. Just as the judiciary responded to the political,

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that maintains over one million files on workers throughout the United States in a variety of manual labor industries. The database contains names of those workers who have applied for worker's compensation and who have sued their employer because of an accident. EIS compiles its database from forms sent by cooperating employers who routinely divulge pertinent information every time they terminate an employee.

[4] *See* Mordechai Mironi, *The Confidentiality of Personnel Records: A Legal and Ethical View*, 25 LAB. L.J. 270, 270 (1974). As Mironi states:

> [When an employee's] personnel records are in the hands of his employer one might assume they are confidential. One might base this assumption on the legal privilege held by physicians, lawyers, clergymen and others. . . . In fact, the whole issue might seem so clear that only academicians would debate the extent of the privilege.
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> Yet, the two spontaneous assumptions are both wrong.

Id.

[5] *See* DAVID F. LINOWES, PRIVACY IN AMERICA: IS YOUR PRIVATE LIFE IN THE PUBLIC EYE? 13-14 (1989) (discussing how access to individual files previously took months when files were physically maintained, and how today's computer technology allows access to take place at the "speed of light").

[6] *See infra* part II (discussing current and potential legal remedies).

[7] *See* Kurt H. Decker, *Employment Privacy Law for the 1990's*, 15 PEPP. L. REV. 551, 577-78 (1988) ("Employment information disclosure to third parties involves the unpredictability or uncertainty of the employer's goodwill and personal value system in handling the sensitive information.").

[8] Only one state, Connecticut, has enacted legislation that prohibits disclosures of personnel files to third parties. *See* CONN. GEN. STAT. ANN. § 31-128f (West 1987).

social, and economic changes of the nineteenth century by recognizing the right to privacy,[9] it should respond to the realities of today's workplace by securing the confidentiality of employment information.

Ironically, in order to meet this challenge, the judiciary must be willing to look beyond the right-to-privacy rubric. As this Comment will demonstrate, the right to privacy and other traditional common-law doctrines have conceptual and constitutional limitations that make them insufficient to assure confidentiality in the workplace.[10] Courts must establish a new way of looking at this problem that allows employees a greater degree of control and certainty regarding the sensitive information held by their employers.

Even though this Comment urges the judiciary to approach this problem in a new way, courts need not construct a wholly new legal doctrine for this purpose. Courts could build upon the recently reconceptualized tort of breach of confidentiality.[11] Using this framework, courts could provide a common-law remedy for disclosures to third parties in much the same way that they recognize the confidentiality of physician-patient or attorney-client relationships.[12] This approach would recognize the highly sensitive nature of information disclosed by an employee to an employer and would treat disclosures to third parties as breaches of a duty not to disclose.

Part I of this Comment looks at the need for a legal remedy when an employer discloses confidential information without employee consent. Part II demonstrates the inability of privacy law, defamation, and other legal frameworks to address this issue. Part III argues that employees could potentially obtain a remedy at

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[9] *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890) ("Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society."). For a discussion of the evolution of the right to privacy, see *infra* notes 54-64 and accompanying text.

[10] *See infra* part II.B.

[11] *See, e.g.*, Peterson v. Idaho First Nat'l Bank, 367 P.2d 284, 290 (Idaho 1961) (recognizing confidential relationship between bank and depositor); Doe v. Roe, 400 N.Y.S.2d 668, 674 (Sup. Ct. 1977) (recognizing confidential relationship between psychiatrist/psychologist and patient); Blair v. Union Free Sch. Dist. No. 6, 324 N.Y.S.2d 222, 228 (Dist. Ct. 1971) (recognizing confidential relationship between school official and student); *see also* Alan B. Vickery, Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426, 1428-34 (1982) (tracing the development of this tort over several decades); *infra* notes 94-105 and accompanying text.

[12] *See infra* notes 128-41 and accompanying text.

common-law tort for disclosures without consent. Recent changes in how some courts address the tort of breach of confidential relationship suggest that the tort could be applied in the employer-employee context to provide a remedy for unauthorized disclosures of personal information. Finally, Part IV discusses how this tort would function if applied in the employer-employee context and suggests how courts could resolve some of the difficult issues this tort would raise.

I. THE NEED FOR CONFIDENTIALITY OF EMPLOYMENT INFORMATION

A. *The Value of Employee Privacy*

Two assumptions underlie this Comment's argument that an employee should have a legal remedy when her employer discloses personal information to third parties: (1) employer disclosures violate employee privacy and (2) employers should face legal liability for such violations. Admittedly, these are normative assumptions in that their acceptance or rejection carries certain judgments about the value of privacy in this society. While an extensive discussion of the definition and value of privacy is well beyond the scope of this Comment, the following section aims to clarify what privacy interests are at stake in the employment context and to explain why these interests are worthy of legal protection.

Courts and commentators identify several different aspects of privacy. Within constitutional law, one's right to privacy protects against invasive acts by the government and its officers, particularly those acts implicating bodily integrity.[13] At common law, most courts recognize four kinds of torts for invasion of privacy: disclosure of private facts, appropriation of name or likeness for personal advantage, intrusion of one's physical solitude or seclusion, and publicity that places one in a false light in the public eye.[14]

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[13] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (stating that the constitutional right to privacy prohibits states from forbidding use of contraceptives); *see also infra* note 54 (noting distinction between the constitutional and common-law right to privacy).

[14] *See* RESTATEMENT (SECOND) OF TORTS § 652A (1977); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 117, at 851 (1984).

Scholars have viewed privacy as including elements of "[a]utonomy, identity, and intimacy"[15] or "secrecy, anonymity, and solitude."[16]

For the purposes of this Comment, the focus is on the aspects of personal control or autonomy that are inherent in the concept of privacy. According to Charles Fried, "The concept of privacy requires . . . a sense of control and a justified, acknowledged power to control aspects of one's environment. . . . [P]rivacy is not just an absence of information abroad about ourselves; it is a feeling of security in control over that information."[17] When an employer discloses an employee's address, salary, or medical problem to a third party without consent, the employee loses her ability to make choices about who has access to this information. Thus, the focus here is on an employee's sense of loss when her employer is able to define and shape the employee's identity beyond the employment relationship.[18]

Some may argue that this loss of autonomy is not significant enough to warrant legal protection. The value of autonomy, however, is not simply that it gives individuals a peaceful state of mind or a greater sense of dignity. At its root, autonomy encourages the kind of atmosphere that is necessary to a free and democratic society. As privacy scholar Alan Westin explains:

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[15] Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 236 (1977).

[16] Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 428 (1980).

[17] Charles Fried, *Privacy*, 77 YALE L.J. 475, 493 (1968). Similarly, another commentator notes:

> [T]he basic attribute of an effective right of privacy is the individual's ability to control the circulation of information relating to him—a power that is essential to maintaining social relationships and personal freedom. Correlatively, when an individual is deprived of control over the spigot that governs the flow of information pertaining to him, in some measure he becomes subservient to those people and institutions that are able to manipulate it.

ARTHUR R. MILLER, THE ASSAULT ON PRIVACY 25 (1971).

[18] It is important to emphasize that this sense of control over personal information transcends notions of private spheres or intimate facts. While information relating to one's mental health or method of contraception lies at the core of privacy, disclosure of "nonintimate" matters such as one's social security number or unlisted telephone number also infringes upon one's sense of autonomy. *See* Gavison, *supra* note 16, at 429 & n.26 (rejecting the idea that one should restrict the notion of privacy to "private" information and asserting that "privacy is related to the amount of information known about an individual"); *see also infra* notes 74-78 and accompanying text (discussing a shortcoming of the privacy tort in the employment context, which is that it often fails to protect disclosures of nonintimate information).

> The autonomy that privacy protects is . . . vital to the development of individuality and consciousness of individual choice in life. . . . This development of individuality is particularly important in democratic societies, since qualities of independent thought, diversity of views, and non-conformity are considered desirable traits for individuals. Such independence requires time for sheltered experimentation and testing of ideas, for preparation and practice in thought and conduct, without fear of ridicule or penalty, and for the opportunity to alter opinions before making them public.[19]

Accordingly, an employer's ability to disclose information about her employees without penalty inhibits an employee's freedom of expression and action.

B. *The Information Collected*

As the Privacy Protection Study Commission noted in its 1977 report on employment records, the quantity of records maintained by employers has risen dramatically in recent years.[20] An employer collects a large quantity of information from her employees during the employment relationship, beginning with the initial application form and periodically throughout the relationship. A brief list of what one might find in an employee's personnel file includes the following: application forms, interviewer's notations, test scores, periodic appraisals, transfers and promotions, disciplinary actions, salaries, tax withholdings, contributions to organizations, and criminal and medical records.[21] Government requirements,[22] greater emphasis on human resources management,[23] and the advancement of computerized data storage and retrieval systems have contributed to the size and scope of information

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[19] ALAN F. WESTIN, PRIVACY AND FREEDOM 34 (1967).

[20] *See* PRIVACY PROTECTION STUDY COMM'N, EMPLOYMENT RECORDS: APPENDIX 3 TO THE REPORT OF THE PRIVACY PROTECTION STUDY COMMISSION 9-10 (1977) [hereinafter EMPLOYMENT RECORDS REPORT] (tracing the growth of records since the early 1900s).

[21] *See* DALE YODER, PERSONNEL MANAGEMENT AND INDUSTRIAL RELATIONS 711 (6th ed. 1970).

[22] *See* EMPLOYMENT RECORDS REPORT, *supra* note 20, at 26-30 (discussing how governmental action has increased employment-related record keeping). Examples of government regulations that have led to an increase in record keeping, though not statutorily mandating it, include the Equal Employment Opportunity Act, 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. III 1991), and the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1988 & Supp. III 1991).

[23] Examples include retirement plans and health insurance.

typically held by an employer. The necessity and accuracy of this information presents serious questions, but these issues are beyond the scope of this Comment.

C. *The Desire for Confidentiality*

The most common criticism of imposing a legal duty of nondisclosure on employers is that it is simply not necessary. The vast majority of employers, so the argument goes, do not disclose information about employees.[24] While it may be true that major corporations typically have policies against disclosing information to third parties,[25] studies indicate that employers routinely violate the confidentiality of employee personal information and that employees are very concerned about this issue.

According to a recent survey of large American industrial corporations, eighty percent of corporations disclose personal information to credit grantors and fifty-eight percent give data to landlords.[26] Thirty-eight percent do not have a policy concerning which records are routinely disclosed in response to inquiries from government agencies.[27] Fifty-seven percent of these corporations

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[24] *See* Alan F. Westin, *Privacy and Personnel Records: A Look at Employee Attitudes*, CIV. LIBERTIES REV., Jan.-Feb. 1978, at 28, 28 ("[E]mployee privacy has been characterized as a 'non-problem' being manipulated by malcontented employees and civil liberties groups looking for agitating tools.").

[25] *See* RONALD E. BERENBEIM, EMPLOYEE PRIVACY 22 (1990). Berenbeim provides a typical company policy for responding to information requests from third parties. In part, it states: "It is a domestic policy of the Corporation and its subsidiaries to respond to requests for information on our employees from third parties subject to review and permission to release such information by the affected employee(s)." *Id.* The policy goes on to state specific procedures for third-party telephone inquiries and written requests. *See id.*; *see also* Peter M. Panken & Stacy B. Babson, *Creating the Personnel Paper Trail: Personnel Manuals and Grievance Procedures*, *in* 1 RESOURCE MATERIALS: LABOR AND EMPLOYMENT LAW 179, 218 (Peter M. Panken ed., 6th ed. 1992) (stating a model confidentiality policy that specifies that the employer "will provide employee information to outside agencies only upon written authorization of the employee or as provided by law").

[26] *See* LINOWES, *supra* note 5, at 40-41. One hundred twenty-six Fortune 500 companies, which employ over 3.7 million persons, responded to the survey. *See id.* at 40. A recent research report suggests that employers are reluctant to disclose employee performance appraisals, disciplinary records, and psychological test scores. *See* BERENBEIM, *supra* note 25, at 8 (stating that more than 75% of employers surveyed will not release such information even with employee consent). The report, however, did not provide any statistics regarding the percentage of employers that disclose information without consent.

[27] *See* LINOWES, *supra* note 5, at 41.

do not notify an employee when such disclosures are made.[28] Only forty-two percent of the corporations even tell their employees about the company disclosure practices.[29]

These practices are clearly of concern to employees. According to one survey, more than fifty percent of workers and executives consider the personal information kept by their employers to be "very important" in terms of privacy, and nearly twenty-five percent feel that their employer's policies on confidentiality are poor or can be improved.[30] Employees may be especially concerned about the confidentiality of information pertaining to medical records and pay rates.[31]

II. CURRENT AND POTENTIAL LEGAL REMEDIES

While employees generally do not have a legal remedy when employers disclose confidential information to third parties, statutory and common law do provide some relief depending on the kind of employer and the kind of information involved. This section surveys the patchwork of legal remedies available to employees in certain circumstances. Ultimately, however, all of these remedies combined fail to give employees the protection they deserve.

A. *Current Statutes Concerning Personnel Files*

At present, only Connecticut statutorily prohibits private employers from disclosing information about employees without their consent.[32] In comparison to legislation in other states, this

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[28] *See* David F. Linowes & Ray C. Spencer, *Privacy: The Workplace Issue of the '90s*, 23 J. MARSHALL L. REV. 591, 593 (1990) (analyzing the same Fortune 500 study).

[29] *See id.* at 594.

[30] *See* Westin, *supra* note 24, at 29.

[31] *See* G. Stephen Taylor & J. Stephen Davis, *Individual Privacy and Computer-Based Human Resource Information Systems*, 8 J. BUS. ETHICS 569, 570 (1989).

[32] *See* CONN. GEN. STAT. ANN. § 31-128f (West 1987). In pertinent part, the provision states:

> No individually identifiable information contained in the personnel file or medical records of any employee shall be disclosed by an employer to any person or entity not employed by or affiliated with the employer without the written authorization of such employee except where the information is limited to verification of dates of employment and the employee's title or position and wage or salary . . . .

Id. The provision allows several exceptions to this duty, including information disclosed pursuant to an administrative summons or judicial order, requests from

law goes the furthest to give employees control over information held by their employers. While statutes in some states give employees the right to view their personnel files and make necessary corrections,[33] no other state statutorily limits what an employer can do with personnel file data once obtained.[34]

Public employees at the state and federal level enjoy much greater protection from third-party disclosures than employees in the private sector. In response to what was perceived as too much public access to sensitive personal information, Congress passed the Privacy Act of 1974.[35] Under the Act, records identifying an employee by name may not be released to the public without the employee's consent, subject to several exceptions.[36] Some states have passed similar legislation to protect state public employees.[37]

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law enforcement officials, medical emergencies, compliance with federal or state law and regulations, and terms of collective bargaining agreements. *See id.* The provision does not state what remedy, if any, an employee would be entitled to in case of such disclosure and no court has addressed this issue.

Note that this statute only concerns information contained in one's personnel file. Thus, an employer's disclosure of information gained through the employment relationship but not incorporated into one's personnel file presumably would not be a violation. By contrast, the tort of breach of confidentiality would impose liability regardless of this distinction. *See infra* notes 153-57 and accompanying text.

[33] *See, e.g.*, CAL. LAB. CODE § 1198.5 (West 1989) (requiring private employers to permit employees to inspect their own personnel files); CONN. GEN. STAT. ANN. § 31-128b (West 1987) (same); ME. REV. STAT. ANN. tit. 26, § 631 (West 1988 & Supp. 1993) (same); MICH. COMP. LAWS ANN. § 423.503 (West Supp. 1993) (same).

[34] Some states, however, limit what an employer may do with a particular kind of information. *See, e.g.*, CAL. CIV. CODE § 56.20(a) (West 1982) (requiring employers to establish safeguards against the unauthorized use or disclosure of medical information they have obtained); CAL. LAB. CODE § 1026 (West 1989) (requiring that an employer "make reasonable efforts to safeguard the privacy of the employee as to the fact that he or she has enrolled in an alcohol or drug rehabilitation program); MICH. COMP. LAWS ANN. § 423.506 (West Supp. 1993) ("An employer or former employer shall not divulge a disciplinary report, letter of reprimand, or other disciplinary action to a third party . . . or to a party who is not a part of a labor organization representing the employee, without written notice . . . .").

[35] 5 U.S.C. § 552a (1988) (stating standards and procedures to govern agency disclosure of individual records to any person or agency); *see also* Freedom of Information Act, 5 U.S.C. § 552(b)(1)(A)(6) (1988) (exempting personnel and medical files from government public disclosure requirements).

[36] The exceptions include instances in which a record is sought by law enforcement officials or by a consumer reporting agency. *See* 5 U.S.C. § 552a(b)(7), (b)(12) (1988). Before disclosing information to a consumer reporting agency, the government must satisfy procedural requirements aimed at preventing unnecessary disclosure. *See* 31 U.S.C. § 3711(f) (1988).

[37] *See, e.g.*, CAL. CIV. CODE § 1798.24 (West 1985 & Supp. 1993) (stating

Thus, public employees at both the federal and state level enjoy much greater protection from disclosure than their private sector counterparts.[38]

Federal laws regulate personnel records in the private sector in very limited ways.[39] Perhaps the most significant of these laws is one recently enacted as part of the Americans with Disabilities Act.[40] Under this law, any information that an employer obtains as the result of a medical examination must be "maintained on separate forms and in separate medical files" and be "treated as a confidential medical record."[41] Other federal laws and regulations control how employers may use immigration documents,[42] allow employee access to records pertaining to workplace health and

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standards and procedures to govern agency disclosure of individual records); CONN. GEN. STAT. ANN. § 4-193 (West 1988) (same); IND. CODE ANN. § 4-1-6-3 (West 1991) (same); MASS. ANN. LAWS ch. 66A, § 2 (Law. Co-op. 1991) (same); MINN. STAT. ANN. § 13.43 (West 1988 & Supp. 1993) (same); OHIO REV. CODE ANN. §§ 1347.05, .08 (Anderson 1979 & Supp. 1992) (same); UTAH CODE ANN. §§ 63-2-202, -302 to -304 (Supp. 1993) (same); VA. CODE ANN. § 2.1-380 (Michie 1987 & Supp. 1993) (same).

[38] Recently, a Clinton administration official came under fire for allegedly disclosing information to the press that he obtained from the personnel files of Bush political appointees. The State Department Inspector General's office is investigating whether the official violated the Privacy Act. *See* Steven A. Holmes, *Retrieval of Bush Personnel Files by Clinton Aide Is Under Inquiry*, N.Y. TIMES, Sept. 4, 1993, § 1, at 6; Walter Pincus, *State Department to Probe Access to Personnel Files: Possible Privacy Act Violations Cited in Check of Bush Appointees*, WASH. POST, Sept. 3, 1993, at A1.

[39] In 1975, Representatives Barry Goldwater, Jr., and Edward Koch proposed a bill that would have extended the Privacy Act to the private sector. *See* H.R. 1984, 94th Cong., 1st Sess. (1975). The bill required employers to establish a procedure to prevent employee personal information from being used outside of the employment relationship. *See id.* § 2(b)(9). Unfortunately, the bill was unsuccessful and did not even come up for a vote. *See generally* Perry R. Fredgant, Comment, *Confidentiality of Personnel Files in the Private Sector*, 15 U.C. DAVIS L. REV. 473, 486-87 (1981); Charles W. Pauly, Comment, *Let Industry Beware: A Survey of Privacy Legislation and Its Potential Impact on Business*, 11 TULSA L.J. 68, 76-81 (1975).

[40] 42 U.S.C. §§ 12101-12150 (Supp. III 1991).

[41] 42 U.S.C. § 12112(d)(3)(B) (Supp. III 1991). This confidentiality may be breached only to inform supervisors about employee accommodations, to provide medical treatment, and to inform government officials about compliance with the law. *See id.* § 12112(d)(3)(B)(i)-(iii). Federal contract employers taking part in affirmative action plans are also required to keep medical information confidential, with similar exceptions. *See* 41 C.F.R. § 60-250.6(c)(3) (1992).

[42] *See* 8 U.S.C. § 1324a(b)(4) (1988) (stating that an employer may retain copies of an employee's immigration or citizenship papers but only for the purpose of complying with the law).

safety,[43] and allow employers to protect potentially confidential affirmative action data that they release to the government.[44]

B. *Current Judicial Doctrines Relating to Personnel Files*

1. Defamation

Although the common-law tort of defamation has significant limitations, it has provided employees with a certain level of protection through its deterrent effect. In recent years, courts have been increasingly willing to recognize defamation suits in the employment context.[45] Although an action giving rise to defamation will rarely concern traditional privacy issues,[46] the success of recent defamation suits has led some attorneys to advise employers not to disclose any information about former employees to third parties except the dates of employment and positions held.[47]

Employer fear of defamation suits, however, does not sufficiently address the privacy problem that employees face. Even if defamation suits do have the desirable effect of curtailing some

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[43] *See* 29 C.F.R. § 1910.20(e) (1992) (stating that employees must have access to medical and toxic exposure records maintained by the employer pursuant to the Occupational Safety and Health Act).

[44] *See* 41 C.F.R. § 60-60.4(a), (d) (1992) (stating that employers may protect the confidentiality of affirmative action records released to the government by either using coded data or by requesting that the records not be subject to the Freedom of Information Act's disclosure requirements).

[45] *See* Pappas v. Air France, 652 F. Supp. 198, 200-01 (E.D.N.Y. 1986) (recognizing defamation for accusation of theft); Battista v. United Illuminating Co., 523 A.2d 1356, 1358-59 (Conn. App. Ct.), (recognizing defamation for assertion of unethical conduct), *certif. denied*, 525 A.2d 1352 (Conn. 1987); Kraus v. Brandstetter, 562 N.Y.S.2d 127, 128-29 (App. Div. 1990) (recognizing defamation for accusation of incompetence).

[46] While defamation law protects employees from false accusations, it is useless against disclosures of true information, no matter how sensitive. Interests in privacy and accuracy are related to a certain extent, however, as both concern information generated by the employer-employee relationship. The proposed tort of breach of confidentiality in the employment context would address both interests simultaneously by limiting all types of information from disclosure regardless of content. *See infra* note 112 and accompanying text.

[47] *See* Gary R. Siniscalco, *Wrongful Termination and Emerging Torts*, 442 P.L.I. LIT. 379 (1992), *available in* Westlaw, TP-All database, PLI file, at *60; *see also* Janet Swerdlow, *Negligent Referral: A Potential Theory for Employer Liability*, 64 S. CAL. L. REV. 1645, 1645 (1991) (stating that increases in employee defamation litigation have led many employers to adopt "no comment" policies).

employer disclosures, this legal doctrine will not provide any redress in the situations where disclosures still occur.[48]

2. Negligent Maintenance of Personnel Files

Another common-law theory that has had an impact on employment information is negligence. In *Quinones v. United States*,[49] a federal court of appeals found that Pennsylvania common law imposed a duty of due care on an employer that undertook the responsibility of maintaining personnel files.[50] The court thus held that the plaintiff may have a cause of action if his employer (the U.S. government) was negligent in releasing incorrect information regarding the employee's termination and that the employer could be held liable for resulting damages.[51]

While the "duty of care" approach could potentially give employees protection against negligent disclosures as well as negligent maintenance of personnel files, no court has extended the duty that far. In fact, one case suggests that this tort is falling out of favor on the grounds that it is more appropriate to view maintenance of personnel files from a contracts perspective.[52] Consequently, expansion of the duty of care approach to encompass personnel record confidentiality does not seem likely.

3. Common-Law Invasion of Privacy

Some commentators predict that the invasion of privacy tort will become one of the most powerful legal tools for employees in the 1990s.[53] Although this may be true in a variety of employment

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[48] *See supra* notes 26-29 and accompanying text.

[49] 492 F.2d 1269 (3d Cir. 1974).

[50] *See id.* at 1278.

[51] *See id.* Because the employer in *Quinones* was the U.S. government, the plaintiff was precluded from bringing a defamation suit under the Federal Tort Claims Act. *See id.* at 1271 & n.3. While the court could have based its ruling solely on federal regulations and executive orders that mandated a duty of care, the court chose to base its decision on Pennsylvania common law as well. *See id.* at 1277-78. Two years later, a federal district court recognized the tort against a private employer based solely on common law. *See* Bulkin v. Western Kraft East, Inc., 422 F. Supp. 437, 442-43 (E.D. Pa. 1976).

[52] *See* Prouty v. National R.R. Passenger Corp., 572 F. Supp. 200, 206 (D.D.C. 1983) (stating that breach of contract is the appropriate avenue for relief absent a "duty to maintain employment records, imposed by statute or law, that would give rise to a negligence action").

[53] *See, e.g.*, KURT H. DECKER, EMPLOYEE PRIVACY LAW AND PRACTICE 141 (1987) ("Current employment litigation confirms that invasion of privacy can be expected

contexts, the conceptual limitations of this doctrine do not adequately protect employee information.

The present common-law right to privacy[54] originates from a law review article written by Samuel Warren and Louis Brandeis in 1890.[55] In order to curb what they perceived as increasing intrusions into the private sphere brought about by new technologies and yellow-sheet journalism,[56] Warren and Brandeis suggested that courts expand the common law beyond traditional legal doctrines, including the then-existing tort of breach of confidence. They proposed an entirely new tort action aimed at the publication of private facts not of "general interest."[57]

The article proved to be highly influential among the nation's judiciary and legislatures[58] and eventually led to acceptance of some form of "private-facts" right to privacy[59] in the vast majority

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to gain wider court approval."); Linowes & Spencer, *supra* note 28, at 591 (stating that "privacy is becoming the workplace issue of the 1990s"); Taylor & Davis, *supra* note 31, at 570 (noting the "emerging body of case law that protects individual privacy" in the workplace).

[54] One should not confuse the common-law right to privacy with the constitutional right to privacy, which protects an individual against certain invasive acts by the government and its officers. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (stating that the constitutional right to privacy prohibits states from forbidding use of contraceptives). The common-law right to privacy, in contrast, is grounded in state tort law and protects one against acts by private groups or individuals. *See* Katz v. United States, 389 U.S. 347, 350-51 (1967) ("[T]he protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States.") (footnote omitted); McNally v. Pulitzer Publishing Co., 532 F.2d 69, 76 (8th Cir.) ("The constitutional right of privacy is not to be equated with the common-law right recognized by state tort law."), *cert. denied*, 429 U.S. 855 (1976); 62A AM. JUR. 2D *Privacy* § 8 (1990 & Supp. 1993) (noting distinction between constitutional and common-law doctrines).

[55] *See* Warren & Brandeis, *supra* note 9, at 193.

[56] *See id.* at 195.

[57] *Id.* at 214.

[58] *See* KEETON ET AL., *supra* note 14, § 117, at 849 ("The recognition and development of the so-called 'right to privacy' is perhaps the outstanding illustration of the influence of legal periodicals upon the courts." (footnote omitted)); Harry Klaven, Jr., *Privacy in Tort Law–Were Warren & Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 327 (1966) (describing the article as the "most influential law review article of all"); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 292 (1983) ("Their advocacy of this new tort created a minor revolution in the development of the common law.").

[59] The private-facts tort is actually one of four types of invasions of privacy currently recognized by most courts. The other three types include appropriation of name or likeness for personal advantage, intrusion upon one's physical solitude or seclusion, and publicity that places a person in a false light in the public eye.

of states.[60] While the elements of the private-facts tort vary slightly from jurisdiction to jurisdiction, many courts either rely on the formulation of the Second Restatement of Torts,[61] or the elements articulated by Dean Prosser.[62] The Restatement requires the plaintiff to prove that the matter publicized "would be highly offensive to the reasonable person" and "is not of legitimate concern to the public."[63] Prosser stated that three requirements had to be satisfied for recovery:

> (1) the disclosure of the private facts must be a public disclosure and not a private one; (2) the facts disclosed to the public must be

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See RESTATEMENT (SECOND) OF TORTS § 652A (1977); KEETON ET AL., *supra* note 14, § 117, at 851. The private-facts tort, however, is the clearest derivative of the original right to privacy articulated by Warren and Brandeis.

[60] Although the right to privacy did not find widespread acceptance initially, by the 1930s most courts began accepting the doctrine. *See* KEETON ET AL., *supra* note 14, § 117, at 851-63. Today, at least 36 states explicitly recognize some form of private-facts right to privacy at common law or by statute. *See, e.g.*, MASS. GEN. LAWS ch. 214, § 1B (Law. Co-op. 1986 & Supp. 1993) (stating that "[a] person shall have a right against unreasonable . . . interference with his privacy"); WIS. STAT. § 895.50 (1983 & Supp. 1992) (recognizing the right of privacy for personal matters); Cason v. Baskin, 20 So. 2d 243, 250 (Fla. 1944) (stating that "there is a right of privacy, distinct in and of itself" under the common law); Beaumont v. Brown, 257 N.W.2d 522, 531 (Mich. 1977) (explaining that an invasion of privacy occurs when private facts that are embarrassing are exposed to the public); Industrial Found. v. Texas Indus. Accident Bd., 540 S.W.2d 668, 679 (Tex.) ("[E]ffective protection of the fundamental 'zones of privacy' . . . implies a concomitant right to prevent unlimited disclosure of information . . . ."), *cert. denied*, 430 U.S. 931 (1976); *see also* Zimmerman, *supra* note 58, at 365-67 (providing an overview of privacy law in all 50 states). A handful of states have expressly rejected the private-facts right to privacy, including New York. *See* Roberson v. Rochester Folding Box Co., 64 N.E. 442, 447 (N.Y. 1902) ("[T]he so-called 'right of privacy' has not as yet found an abiding place in our jurisprudence.").

[61] *See, e.g.*, Wasser v. San Diego Union, 236 Cal. Rptr. 772, 775 (Ct. App. 1987); Goodrich v. Waterbury Republican-American, Inc., 448 A.2d 1317, 1330 (Conn. 1982); Barker v. Huang, 610 A.2d 1341, 1350 (Del. 1992); Wolf v. Regardie, 553 A.2d 1213, 1217 (D.C. 1989); Williams v. City of Minneola, 575 So. 2d 683, 689 (Fla. Dist. Ct. App. 1991); Near East Side Community Org. v. Hair, 555 N.E.2d 1324, 1335 (Ind. Ct. App. 1990); Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289, 291 (Iowa 1979), *cert. denied*, 445 U.S. 904 (1980); Werner v. Kliewer, 710 P.2d 1250, 1255 (Kan. 1985); Roshto v. Hebert, 439 So. 2d 428, 430 (La. 1983); Matheson v. Bangor Publishing Co., 414 A.2d 1203, 1204 (Me. 1980); Hollander v. Lubow, 351 A.2d 421, 425 (Md.), *cert. denied*, 426 U.S. 936 (1976); Young v. Jackson, 572 So. 2d 378, 382 (Miss. 1990); Y.G. v. Jewish Hosp., 795 S.W.2d 488, 498 (Mo. Ct. App. 1990); Hall v. Post, 372 S.E.2d 711, 714 (N.C. 1988).

[62] *See, e.g.*, Kinsey v. Macur, 165 Cal. Rptr. 608, 611 (Ct. App. 1980) (citing Prosser); Oden v. Cahill, 398 N.E.2d 1061, 1063 (Ill. App. Ct. 1979) (same); KEETON ET AL., *supra* note 14, § 117, at 856.

[63] RESTATEMENT (SECOND) OF TORTS § 652D (1977).

> private facts, and not public ones; and (3) the matter made public must be one which would be highly offensive and objectionable to a reasonable person of ordinary sensibilities.[64]

While employees have found some success with the private-facts tort in recent years,[65] the requirements for this cause of action present significant barriers in many employment contexts. First, Prosser's "public disclosure" requirement mentioned above may bar suit where the employer makes a disclosure to a small group or a single individual, as opposed to the public at large.[66] In the employment context, such a limited disclosure is far more likely than any broad dissemination, as the hypothetical scenarios at the beginning of this Comment suggest.[67] For example, in *Eddy v. Brown*,[68] the Oklahoma Supreme Court held that an employee did not satisfy the publicity requirement of the private-facts tort where his employer only told a limited number of his co-workers that he was undergoing psychiatric treatment.[69] The court stated that "[p]ublication to the community of employees at staff meetings and discussions between defendants and other employees is clearly different from the type of *public* disclosure" required.[70] While some states have applied the publicity requirement less rigidly in

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[64] KEETON ET AL., *supra* note 14, § 117, at 856-57 (footnote omitted).

[65] *See infra* notes 71-73 and accompanying text.

[66] According to the Restatement:

> Publicity . . . means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. . . .
>
> Thus it is not an invasion of the right of privacy . . . to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons. On the other hand, any publication in a newspaper or a magazine, even of small circulation, or in a handbill distributed to a large number of persons, or any broadcast over the radio, or statement made in an address to a large audience, is sufficient to give publicity . . . .

RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977).

[67] *See supra* Introduction.

[68] 715 P.2d 74 (Okla. 1986).

[69] *See id.* at 78.

[70] *Id.* at 78 n.13 (quoting Wells v. Thomas, 569 F. Supp. 426, 437 (E.D. Pa. 1983)).

analogous circumstances,[71] many jurisdictions have refused to do so.[72]

A second barrier posed by the private-facts tort is embodied in its very name: only disclosure of "private" facts constitute a tortious action. Some facts will clearly fall into this category, such as any information relating to an individual's physical or mental health.[73] Most information, however, falls into a grey area. For example, in *Baker v. Burlington Northern, Inc.*,[74] the Idaho Supreme Court held that an employer's disclosure of an employee's criminal record was disclosure of public, not private, facts and thus was not actionable.[75] Quoting the *First Restatement of Torts*, the court stated that

> criminals "are the objects of legitimate public interest during a period of time after their conduct . . . has brought them to the public attention; until they have reverted to the lawful and unexciting life led by the great bulk of the community, they are subject to the privileges which publishers have to satisfy the curiosity of the public as to their leaders, heroes, villains, and victims."[76]

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[71] *See, e.g.*, Miller v. Motorola, Inc., 560 N.E.2d 900 (Ill. App. Ct. 1990). In this case, the court held that an employee could bring a suit for public disclosure of private facts where her employer disclosed her masectomy surgery to some co-workers. Applying Prosser's three-part test for recovery, the court liberally construed the public disclosure requirement by reasoning that "where a special relationship exists between the plaintiff and the 'public' to whom the information has been disclosed, the disclosure may be just as devastating to the person even though the disclosure was made to a limited number of people." *Id.* at 903. *See also* Beaumont v. Brown, 257 N.W.2d 522, 523, 532 (Mich. 1977) (holding that employer's disclosure of employee's health problems and insubordinate behavior to Army Reserve in which employee served satisfied publicity requirement).

[72] *See, e.g.*, Beard v. Akzona, Inc., 517 F. Supp. 128, 133 (E.D. Tenn. 1981) (stating that disclosure of information to only five employees did not constitute sufficient publicity); Rogers v. International Business Mach. Corp., 500 F. Supp. 867, 870 (W.D. Pa. 1980) (holding that information conveyed to employees who require such information did not constitute publication of private activities).

[73] *See, e.g.*, Levias v. United Airlines, 500 N.E.2d 370, 373 (Ohio App. 1985) (holding that employee could reasonably expect that employer medical examiner would treat her highly personal medical information as confidential); *see also* Vassiliades v. Garfinckel's, 492 A.2d 580, 588 (D.C. 1985) (stating that plaintiff's plastic surgery was a private fact). In any event, disclosures of medical information are proscribed by federal and state statutory law. *See supra* notes 34, 41 and accompanying text.

[74] 587 P.2d 829 (Idaho 1978).

[75] *See id.* at 833.

[76] *Id.* (quoting RESTATEMENT (FIRST) OF TORTS § 867 cmt. c (1939)). The court noted, however, that disclosure of crimes that took place in the distant past may be actionable. *See Baker*, 587 P.2d at 833; *see also* Briscoe v. Reader's Digest Ass'n,

Even less likely to pass the private-facts requirement would be information as simple as addresses and telephone numbers. Although pertaining to a slightly different context, a Louisiana appellate court made clear that employee addresses should not be considered private information:

> A person's employment, where he lives, and where he works are exposures which we all must suffer. We have no reasonable expectation of privacy as to our identity or as to where we live or work. Our commuting to and from where we live and work is not done clandestinely and each place provides a facet of our total identity.[77]

Thus, even the scenario given at the beginning of this Comment concerning the disclosure to the harassing former lover[78] would not be actionable as a private-facts tort.

A third barrier posed by this tort is the requirement that the disclosure be highly offensive to the reasonable person. This element in essence takes control away from the employee concerning what is known about her and places the control in the hands of a judge or jury. Why must a disclosure be shocking or extremely invasive before it constitutes a tort? If the essence of privacy is a feeling of control over information about ourselves, it should not matter whether our employer discloses information about one's use of contraceptives or one's negative performance evaluation.

This question brings us to a much larger issue looming over the private-facts tort as a whole. The problem with this tort is not simply one of line drawing. Even a court sympathetic to the needs of the employee could not construe the private-facts tort broadly enough to provide protection in many circumstances. At some point, the First Amendment ultimately provides a shield for the employer against actions based on the content of its speech.

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483 P.2d 34, 41 (Cal. 1971) (holding that publication of plaintiff's crime 11 years after he had "paid his debt to society" constituted public disclosure of private facts).

[77] Webb v. City of Shreveport, 371 So. 2d 316, 319 (La. Ct. App.) (holding that a state public records law required disclosure of city employee names and addresses and that such disclosure was not actionable based on private-fact tort nor U.S. or state constitutions), *writ denied*, 374 So. 2d 657 (La. 1979). The court appeared to conflate the common law and constitutional origins of a right to privacy. *See supra* note 54.

[78] *See supra* Introduction.

Much of this tension between the First Amendment and the private-facts tort stems from a strong aversion to censorship by the press.[79] Admittedly, this tension is greatly diminished when concerning a non-media defendant, such as an employer, who disseminates information to a limited audience. Yet the case law suggests that courts are not only critical of the private-facts tort because of its impact on the media. A second difficulty with this tort stems from its subjective treatment of the content of one's speech.[80] The private-facts requirement and especially the "highly offensive" requirement force courts and juries to use standards which are difficult to apply consistently and are more likely to turn on personal inclinations than a clear societal norm. In this way, the private-facts tort tends to have a chilling effect on speech and particularly discourages the disclosure of information that is repugnant or controversial.

This is not to say that the First Amendment is on the verge of eradicating the private-facts tort; the Supreme Court has stated that this tort plays a needed role in American jurisprudence. Nonetheless, the tension between the First Amendment and this tort remains largely unresolved. This tension prevents courts from applying this tort in ways that would fully address the needs of individuals in the employment context. While the private-facts tort may serve employees in the most egregious circumstances or on sporadic occasions, the tort cannot provide any sense of employees' control over their identities.

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[79] *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 489 (1975) (referring to the private-facts tort, the court stated that "[b]ecause the gravamen of the claimed injury is the publication of information, whether true or not, the dissemination of which is embarrassing or otherwise painful to an individual, it is here that claims of privacy most directly confront the constitutional freedoms of speech and press"); *see also* Florida Star v. B.J.F., 491 U.S. 524, 533 (1989) (noting that both the First Amendment and the private-facts tort are "'plainly rooted in the traditions and significant concerns of our society'" (quoting Cox Broadcasting Corp. v. Cohen, 420 U.S. at 491)).

[80] *See* Cohen v. Cowles Media Co., 111 S. Ct. 2513, 2519 (1991) (noting the context-based nature of the private-facts tort).

III. TOWARD EMPLOYMENT-RECORD CONFIDENTIALITY UNDER LAW

Given the inadequacies of privacy, defamation, and negligence, it is unlikely that the courts will be able to form a reliable remedy out of any of these doctrines. Realizing these shortcomings, some commentators have seen legislation as the only possible means of providing protection.[81] Recent changes in the ways some courts view the tort of breach of confidentiality, however, suggest that confidentiality of employment information is attainable at common law.

A. *The Traditional Approach to Confidential Relationships*

At common law, courts have traditionally recognized certain relationships that carry a duty to act or not to act in certain ways—typically called either fiduciary relationships or, more generally, confidential relationships. Under this doctrine, courts recognize that certain relationships in the society implicitly signify an obligation to "act in good faith, and with due regard to the interests of the one reposing the confidence."[82] As a matter of law, these relationships usually include attorney-client,[83] partner-partner,[84] principal-agent,[85] trustee-beneficiary,[86] and venturer-joint venturer.[87] In the context of these relationships, an individual

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[81] *See* Fredgant, *supra* note 39, at 475-76 (arguing that the Privacy Act of 1974 should be extended to apply to employment relationships in the private sector).

[82] 36A C.J.S. *Fiduciary* 384 (1991).

[83] *See, e.g.*, Trafton v. Youngblood, 442 P.2d 648, 655 (Cal. 1968) (stating that the attorney-client relationship "'is one of a strict fiduciary and confidential nature'") (quoting Bradner v. Vasquez, 272 P.2d 11, 13 (1954)).

[84] *See, e.g.*, Olivier v. Uleberg, 23 N.W.2d 39, 43 (N.D. 1946) (stating that partners have a fiduciary relationship).

[85] *See, e.g.*, Moon v. Phipps, 411 P.2d 157, 161 (Wash. 1966) (stating that a principal-agent relationship is transformed into a fiduciary relationship "either expressly or by implications of law or fact," when the principal "relax[es] the care and vigilance which the law ordinarily requires" and she "would customarily exercise on [her] own behalf").

[86] *See, e.g.*, Swenson v. Wintercorn, 234 N.E.2d 91, 97 (Ill. App. 1968) (stating that a fiduciary relationship exists between a trustee and a beneficiary as a matter of law).

[87] *See, e.g.*, Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) (stating that joint venturers are "subject to fiduciary duties akin to those of partners" and "owe to one another . . . the duty of the finest loyalty").

must behave with the interest of the other in mind–including not disclosing information that may harm her. On a case-by-case basis, a court may recognize a relationship beyond these contexts as confidential, so long as such a relationship is characterized by "kinship."[88] In the past, courts have recognized relationships between landlord and tenant, husband and wife, and priest and penitent as confidential.[89] Since a finding of a confidential relationship has traditionally turned on trust and expectation of good relations between the parties, courts have not yet found such a relationship to exist between employer and employee.

B. *A New Approach to Confidential Relationships*

Until the last few decades, courts were reluctant to expand the tort of breach of confidential relationship beyond limited circumstances.[90] Some speculate that this period of dormancy for the tort was due to the emergence of the right to privacy as first articulated by Warren and Brandeis.[91] Courts may have assumed that the right to privacy provided a more appropriate framework in which to address confidentiality concerns.[92] As the doctrine

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[88] 15A C.J.S. *Confidential* 352 (1967).

[89] *See* WESTIN, *supra* note 19, at 335.

[90] According to one commentator, courts explicitly or implicitly addressed the tort of breach of confidential relationship in the context of personal information (that is, not under trade secret law or common-law copyright) only six times prior to 1960: Bazemore v. Savannah Hosp., 155 S.E. 194, 195 (Ga. 1930) (holding that misappropriation of picture of deformed child by hospital staffworkers violated trust relationship); Douglas v. Stokes, 149 S.W. 849, 850 (Ky. 1912) (holding that photographer's unauthorized use of pictures of dead babies breached the confidential relationship); Simonsen v. Swenson, 177 N.W. 831, 832-33 (Neb. 1920) (stating that private cause of action exists for physician betrayal of patient secrets); Munzer v. Blaisdell, 49 N.Y.S.2d 915 (Sup. Ct. 1944) (holding that mental institution's disclosure of patient records breached confidential relationship), *aff'd mem.*, 58 N.Y.S.2d 359 (App. Div. 1945); Clayman v. Bernstein, 38 Pa. D. & C. 543, 544 (C.P. Phila. County 1940) (holding that physician's unauthorized photograph of patient's disfigured face breached trust or confidence); Smith v. Driscoll, 162 P. 572, 573 (Wash. 1917) (affirming physician-patient confidentiality but allowing disclosure in the courtroom if material and relevant). *See* Vickery, *supra* note 11, at 1454 n.146.

[91] *See* Warren & Brandeis, *supra* note 9, at 193; Vickery, *supra* note 11, at 1455 (speculating that the tort of breach of confidential relationship never assumed prominence in the United States because many courts handled disclosures of personal information under the right of privacy rubric).

[92] Warren and Brandeis argued that the breach of confidence doctrine (based on contract principles) was too narrow to address personal privacy needs because "modern devices afford abundant opportunities for the perpetration of such

developed, however, certain requirements under privacy law proved too cumbersome to provide meaningful protection and did not accommodate certain factual circumstances.[93]

Beginning in the 1960s, courts began to revitalize the breach of confidentiality tort by recognizing confidential relationships in a wider variety of contexts.[94] These relationships included physician-patient,[95] psychiatrist-patient,[96] banker-depositor,[97] and school-student.[98] But rather than simply expanding the scope of traditional fiduciary relationships to encompass these relationships as well, many courts moved beyond this framework. Instead of emphasizing the relationship's fiduciary or kinship nature, the courts emphasized the customary expectation of confidentiality and the public policy supporting this expectation. For example, in *Blair v. Union Free School District No. 6*,[99] the court reasoned that

> [a]lthough the relationship of a student and a student's family with a school and its professional employees probably does not constitute a fiduciary relationship, it is certainly a special or confidential relationship. In order for the educational process to function in an effective manner it is patently necessary that the student and the student's family be free to confide in the professional staff of the school with the assurance that such confidences will be respected.[100]

Thus, without any statutory or contractual basis, the court determined that for the good of the "educational process," information disclosed to school officials should be held in confidence and that any breach of this confidence should be actionable under tort law.[101]

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wrongs without any participation by the injured party." Warren & Brandeis, *supra* note 9, at 211.

[93] *See supra* text accompanying notes 65-78.

[94] For an extended discussion of this phenomenon, see Vickery, *supra* note 11, at 1428-34.

[95] *See, e.g.*, Humphers v. First Interstate Bank, 696 P.2d 527, 534 (Or. 1985).

[96] *See, e.g.*, Doe v. Roe, 400 N.Y.S.2d 668, 674 (Sup. Ct. 1977).

[97] *See, e.g.*, Peterson v. Idaho First Nat'l Bank, 367 P.2d 284, 289-90 (Idaho 1961).

[98] *See, e.g.*, Blair v. Union Free Sch. Dist. No. 6, 324 N.Y.S.2d 222, 227 (Dist Ct. 1971).

[99] *Id.*

[100] *Id.* at 228.

[101] One court, however, has held that statutory law must support a finding that public policy requires a confidential relationship. *See* Humphers v. First Interstate Bank, 696 P.2d 527, 534 (Or. 1985); *infra* notes 133-42 and accompanying text.

This approach to confidential relationships was first explicitly acknowledged by the District of Columbia Court of Appeals in *Vassiliades v. Garfinckel's*.[102] In that case, a plastic surgeon disclosed photographs of his patient before and after cosmetic surgery. The court held that the physician had breached a duty of confidentiality to his patient through this disclosure.[103] In reaching this conclusion, the court applied the following standard:

> The tort of breach of "confidential relationship" is generally described as consisting of the "unconsented, unprivileged disclosure to a third party of nonpublic information that the defendant has learned within a "confidential relationship." It arises from the *limited duty* that attaches to "nonpersonal relationships customarily understood to carry an obligation of confidence." That limited duty conveys a standard that is more strict than the reasonable man test and provides fair warning to potential defendants that "for so palpable a wrong, the law provides a remedy."[104]

Relying on the limited-duty standard, the court reasoned that the public policy of the District of Columbia strongly suggested that the physician-patient relationship should be deemed confidential as a matter of law.[105]

The limited-duty approach is fundamental to the reconceptualized tort of breach of confidential relationship. Embodied in this approach are three closely related limitations.[106] First, the key element of this duty is the nature of the relationship, not the kind of information exchanged. Second, this relationship must be of a public nature that goes beyond mere friendship, family, or confessor-confidant. Third, this relationship must be customarily understood to carry an obligation of confidence, not simply one in which an individual would reasonably believe that such information should be confidential.

All of these limitations serve roughly the same purpose: to ensure that the parties realize and expect that information exchanged should not be disclosed to third parties. The parameters

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[102] 492 A.2d 580 (D.C. 1985). The court heavily relies on a student comment that recognized the evolution of the new tort of breach of confidentiality and proposed a standard for recognizing confidential relationships. *See id.* at 589; Vickery, *supra* note 11, at 1455-62.

[103] *See Vassiliades*, 492 A.2d at 592.

[104] *Id.* at 591 (emphasis added) (citing Vickery, *supra* note 11, at 1455, 1460).

[105] *Id.* at 591-92.

[106] *See* Vickery, *supra* note 11, at 1460-61.

of personal relationships are prone to uncertainty and the emotional nature of such relationships makes expectations uncertain.[107] In contrast, nonpersonal relationships often have a clearly defined scope and the information exchanged in such relationships is done so with a particular purpose in mind. The "customary" requirement further limits this tort to only those relationships that typically give rise to confidentiality concerns. For example, personal information exchanged within the seller-buyer relationship would not typically be thought of as confidential.

This line between confidential and nonconfidential relationships serves several purposes, both practical and legal. In a practical sense, the approach alleviates the evidentiary burden of proving whether confidentiality was expected in the particular factual circumstance. Once the existence of the relationship is proved, the factual inquiry turns on expectations within such a relationship in the abstract.[108] This stands in contrast to the more traditional approach of identifying confidential relationships.[109]

In a legal sense, the tort's differentiation between confidential and nonconfidential is in keeping with a notion fundamental to tort law: the law should provide notice of the relative risks and consequences of one's actions.[110] But more importantly, this differentiation also serves to minimize First Amendment concerns. As discussed earlier, the private-facts tort faces constitutional pressure because it is based partially on speech content and relies on a subjective standard.[111] The tort of breach of confidential

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[107] For a proposal of how confidentiality could protect personal privacy in nonprofessional relationships, see generally G. Michael Harvey, Comment, *Confidentiality: A Measured Response to the Failure of Privacy*, 140 U. PA. L. REV. 2385 (1992). Harvey argues that the courts should recognize a breach of confidentiality in this context where there is an explicit and voluntary agreement between the parties and disclosure is "public." *Id.* at 2393. He emphasizes that "individuals themselves would bear the burden of delineating what is and is not private." *Id.* at 2395.

[108] *See* Vickery, *supra* note 11, at 1461.

[109] *See* Gregory B. Westfall, Comment, *"But I Know It When I See It": A Practical Framework for Analysis and Argument of Informal Fiduciary Relationships*, 23 TEX. TECH L. REV. 835, 842-43 (1992) (stating that under Texas law only traditional fiduciary relationships which exist as a matter of law are entitled to a presumption of confidentiality and that all other confidential relationships must be proven on a case-by-case basis).

[110] *See* Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change*, 1890-1990, 80 CAL. L. REV. 1133, 1171 (1992) ("Tort liability must be premised on the realistic belief that the tortfeasor will be put on notice of the tortious conduct.").

[111] *See supra* notes 79-80 and accompanying text.

relationship, however, does not face such constitutional pitfalls. For this tort, the court simply focuses on whether an unauthorized disclosure has taken place within the context of a confidential relationship. The content of this disclosure is not relevant for purposes of liability.[112]

The Supreme Court has been generally more sympathetic to limitations on speech which stem from a prior agreement between the parties.[113] Recently, the Court suggested that it prefers this type of limitation compared to the content-based method:

> In [private-fact tort] cases, the State itself defined the content of publications that would trigger liability. . . . [B]y contrast, Minnesota simply requires those making promises [of confidentiality] to keep them. The parties themselves . . . determine the scope of their legal obligations and any restrictions which may be placed on the publication of truthful information are self-imposed.[114]

Similarly, when entering into a common-law confidential relationship, parties implicitly promise not to make unauthorized disclosures to third parties.

Some may argue that such a promise of confidentiality should be explicit before liability attaches. While such a requirement may be in keeping with the idea that constitutional rights should not be easily divested,[115] courts have not required explicit agreements in the context of relationships traditionally recognized as fiduciary at common law.[116] Presumably, this practice stems from the belief that certain relationships inherently convey an obligation not to

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[112] The amount of damages awarded, however, would turn on the content and nature of the disclosure. *See infra* notes 174-80 and accompanying text.

[113] *See, e.g.*, Snepp v. United States, 444 U.S. 507, 510-11 (1980) (holding that a former CIA agent had no First Amendment right to breach obligation to CIA which required prepublication clearance).

[114] Cohen v. Cowles Media Co., 111 S. Ct. 2513, 2519 (1991). Even in dissent, Justice David Souter acknowledged that promises of confidentiality should be enforced where the plaintiff is not a public figure. *See id.* at 2523 (Souter, J., dissenting); *see also* Harvey, *supra* note 107, at 2424.

[115] In Humphers v. First Interstate Bank, 696 P.2d 527 (Or. 1985), the court stated that restricting speech based on simply a customary confidential relationship violated the state constitution's free speech clause. *See id.* at 534. It held, however, that a confidential relationship grounded in statutory law could be the basis of liability. *See id.*

[116] *See, e.g.*, Hawkins v. Holiday Inns, Inc., 1980-2 Trade Cas. (CCH) ¶ 63,311, R 75, 619 (W.D. Tenn. 1980) ("There are certain demands made upon attorneys which may in fact interfere with unfettered speech, such as the duty to preserve a client's confidences."), *aff'd*, 652 F.2d 57, *cert. denied*, 101 S. Ct. 2322 (1981).

disclose. The relationship itself serves as a proxy for a promise of confidentiality and places the parties on notice of potential tortious conduct. In this way, the legal obligation not to disclose is self-imposed and does not conflict with First Amendment principles.

It must be noted that few courts have explicitly adopted the limited-duty approach. Many courts continue to adhere to the fiduciary conception of such a relationship. For example, in *Brandt v. Medical Defense Associates*,[117] the court recognized the confidentiality of a physician-patient relationship by analogy to traditional fiduciary relationships such as those between officers of a corporation and shareholders.[118] In *Schoneweis v. Dando*,[119] the court refused to recognize a confidential relationship between a creditor bank and a debtor because the information imparted by the bank was not received in its capacity as an agent.[120] The court noted, however, that the information imparted by the bank was not of the kind that one would "normally expect would be kept confidential."[121]

One court has characterized Vickery's formulation as problematic and casting too wide of a net.[122] The court stated:

> The problem with [Vickery's] formulation of civil liability lies in identifying the confidential relationships that carry a duty of keeping secrets. [He] suggests that the duty arises in all nonpersonal relationships "customarily understood" to carry an obligation. . . .
>
> We do not think that the law casts so wide a net. It requires more than custom to impose legal restraints on "the right to speak, write, or print freely on any subject whatever." . . . [The] legal duty not to speak, unless voluntarily assumed in entering the relationship, will not be imposed by courts or jurors in the name of custom or reasonable expectations.[123]

The court rejected the lower court's rationale, which had recognized a confidential relationship between physician and patient based on public policy and common expectations.[124] It nonetheless

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[117] 856 S.W.2d 667 (Mo. 1993).

[118] *See id.* at 670 (noting that a "physician has a fiduciary duty of confidentiality not to disclose any medical information received in connection with his treatment of the patient").

[119] 435 N.W.2d 666 (Neb. 1989).

[120] *See id.* at 673.

[121] *Id.* (quoting Graney Dev. Corp. v. Taksen, 400 N.Y.S.2d 717, 720 (Sup. Ct.), *aff'd*, 411 N.Y.S.2d 756 (App. Div. 1978)).

[122] *See* Humphers v. First Interstate Bank, 696 P.2d 527, 533-34 (Or. 1985).

[123] *Id.* (citations omitted).

[124] *See* Humphers v. First Interstate Bank, 684 P.2d 581, 585-87 (Or. Ct. App.

affirmed that the confidentiality of the physician-patient relationship could be based on legal sources, such as a patient's statutory privilege to exclude a physician's testimony in litigation and statutory professional regulations.[125]

The rationale behind the court's distinction between duties based on custom and duties inferred from statutory law is not altogether clear. This approach seems too restrictive on the traditional ability of courts to create a new remedy at common law where they are confronted with injuries that should be compensated. Moreover, the court does not explain how traditional common-law fiduciary relationships—some finding little support in statutory law—nevertheless satisfy such scrutiny.[126]

C. *Considering the Employee-Employer Relationship Confidential*

Traditionally, the employee-employer relationship has not been considered a confidential relationship by the courts.[127] Given the possible change in the way courts approach confidential relationships, however, establishment of such a relationship is now conceivable.[128]

1984), *aff'd in part, rev'd in part*, 696 P.2d 527 (Or. 1985).

[125] *See Humphers*, 696 P.2d at 534-36.

[126] Even if one accepts the *Humphers* court's restrictive approach, the employer-employee relationship may still be considered confidential. In at least one jurisdiction, courts recognize an employment record privilege stemming from a constitutional right to privacy. This legal source may be sufficient to legitimize the confidentiality of this relationship. *See infra* note 138 and accompanying text.

[127] *See* WESTIN, *supra* note 19, at 335 (asserting that confidential communications between employer and employee were not historically considered by courts to be entitled to privacy). In a recent California case, the court refused to recognized this relationship as confidential. *See* Amid v. Hawthorne Community Medical Group, Inc., 261 Cal. Rptr. 240, 245 (Ct. App. 1989) (stating that a "bare employee-employer relationship" did not create a confidential relationship where a hospital-employer disclosed a medical performance evaluation of a doctor-employee to a health insurer).

[128] Making the employee-employer relationship confidential at common law has been addressed before, but not in a detailed manner. In 1974, one commentator raised this as a possibility but ultimately concluded that it was unlikely in the near future. *See* Mironi, *supra* note 4, at 279-80, 286. The commentator did not rule out the possibility, but concluded that "[t]o wait for courts to establish common-law protection is too great a risk. Change must come from federal and state legislation." *Id.* at 288. Given that the courts have not done so in the 19 years since the article's publication, the commentator's fears at that time appear to be justified. It is also apparent, however, that he based his conclusions on the limited framework that the courts used at the time and did not foresee the coming changes in the tort of breach of confidential relationship. He stated: "In the

The employee-employer relationship satisfies the three-part limited-duty concept of confidential relationships proposed by Vickery and the District of Columbia Court of Appeals.[129] First, the relationship aspect of employee-employer interaction is clearly defined and recognized by the parties involved from the beginning. The tie between employee and employer is neither speculative nor prone to misinterpretation. The relationship is fundamental to the economic structure and a necessary part of most persons' everyday lives.[130] Moreover, the employee-employer relationship has deep roots in common and statutory law. The law of agency recognizes employer liability in several contexts while state and federal statutes impose many restrictions and duties on individuals who enter this relationship either as an employee or an employer.[131]

Second, the employee-employer relationship clearly satisfies the nonpersonal requirement. It is a contractual relationship in which information is divulged for reasons of economic necessity, not because of emotional or familial ties.

Third, and most importantly, the employee-employer relationship strongly suggests an expectation and custom of confidentiality. When an employee gives information to her employer, such as financial records, medical records, or criminal records, this information is given for one reason only: to aid the employer in her ability to run her business effectively. There is an implicit expectation that these records will be used for their intended purpose. Moreover, the nature of the information itself strongly suggests that it is to be kept confidential. In nearly every other context in one's life, when information about one's health or finances is exchanged between individuals in a non-social context, an expectation of confidentiality is assumed.

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absence of legislation, the courts are not quick to enlarge common-law privileges. '[J]udges have not shown any enthusiasm for broadening them [the confidential relationship privileges] to include information given to reporters, school

This expectation is based on more than mere custom.[132] Courts have acknowledged the sensitivity of this information through statutory interpretation and confidentiality concerns during the discovery process. In *Detroit Edison Co. v. NLRB*,[133] the Supreme Court held that an employer was justified in withholding from the union the aptitude test scores of named employees on the grounds that absolute confidentiality of such information was necessary to avoid employee embarrassment.[134] The Court stated that "[t]he sensitivity of any human being to disclosure of information that may be taken to bear on his or her basic competence is sufficiently well known to be an appropriate subject of judicial notice."[135] Thus, the Court weighed the expectation of confidentiality heavily against the union's statutory right to gain access to information relevant to its duties as the employees' bargaining representative.[136]

In another context, some courts have been sensitive to personnel record confidentiality during pretrial discovery.[137]

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[132] *See Humphers*, 696 P.2d at 534-36 (court unwilling to base a confidential relationship on custom alone and instead looking to "legal" sources of an expectation of confidentiality).

[133] 440 U.S. 301 (1979).

[134] *See id.* at 317.

[135] *Id.* at 318.

[136] *See id.* at 319.

[137] In California, courts have held that allowing discovery of personnel files absent a compelling need violates the state constitutional right to privacy. *See* Harding Lawson Assocs. v. Superior Court, 12 Cal. Rptr. 2d 538, 539 (Ct. App. 1992) (holding that "the balance will favor privacy for confidential information in third party personnel files unless the litigant can show a compelling need for the particular documents and that the information cannot reasonably be obtained through depositions or from nonconfidential sources"); El Dorado Sav. & Loan Ass'n v. Superior Court, 235 Cal. Rptr. 303, 305 (Ct. App. 1987) (nullifying lower court order compelling production of entire employee personnel file in employment discrimination suit on grounds that less intrusive means must first be considered); Board of Trustees v. Superior Court, 174 Cal. Rptr. 160, 165 (Ct. App. 1981) (holding that trial court abused its discretion by ordering discovery of personnel records given the privacy issues at stake); *see also* Cutter v. Brownbridge, 228 Cal. Rptr. 545, 549 (Ct. App. 1986) ("In the context of discovery of confidential information in personnel files, even when such information is directly relevant to litigation, discovery will not be permitted until a balancing of the compelling need for discovery against the fundamental right of privacy determines that disclosure is appropriate.").

While California bases the personnel file privilege on state constitutional law, other states have based this privilege on public policy considerations. *See* DeLoitte Haskins & Sells v. Green, 370 S.E.2d 194, 195 (Ga. Ct. App. 1988) ("Clearly, the discoverability of [personnel files] must be balanced against the competing interests that appellant and its affected employees have in the maintenance of the

Facing discovery requests for personnel records pertaining to the litigation, courts will "favor privacy for confidential information in third party personnel files unless the litigant can show a compelling need for the particular documents and that the information cannot reasonably be obtained through depositions or from nonconfidential sources."[138] The existence of an employment record privilege strongly supports the idea that courts should recognize the employer-employee relationship as confidential. In an analogous situation, the District of Columbia Court of Appeals recognized a confidential relationship between physician and patient based in part on a law that excluded the in-court testimony of physicians about their patients except in limited circumstances.[139] The court reasoned that this and other local statutes "suggest that the policy in this jurisdiction is to encourage candor by patients and confidentiality by physicians."[140] Likewise, the employment record privilege suggests that it is the policy of those jurisdictions to protect the confidentiality interests of employees. To the extent that courts themselves acknowledge and affirm the custom of confidentiality in the employer-employee context, they should have little trouble finding this expectation "customary" as a matter of law.[141]

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confidentiality and privacy of the internally generated personnel records and evaluations.").

[138] *Harding Lawson Assocs.*, 12 Cal. Rptr. 2d at 539. This is not to say that courts will never allow discovery of employment records under this standard. Courts have occasionally found a compelling need for the production of these documents. *See, e.g.*, Dixon v. Rutgers, 541 A.2d 1046, 1058 (N.J. 1988) (holding that peer review materials in personnel file were discoverable in antidiscrimination suit but stating that the court should "take various measures designed to minimize intrusion into their confidentiality").

[139] *See* Vassiliades v. Garfinckel's, 492 A.2d 580, 591 (D.C. 1985) (citing D.C. Code § 14-307 (1981)).

[140] *Id.*

[141] One court has held that basing confidential relationships on custom alone unduly infringed the state's constitutional freedom of speech clause. *See* Humphers v. First Interstate Bank, 696 P.2d 527, 534 (Or. 1985). Instead of custom, the court stated that such a relationship could only arise from "legal" sources, such as statutory privilege and statutory professional regulations. *See id.* Thus, where a privilege stemming from constitutional or statutory law buttresses a court's finding of custom, such constitutional problems disappear. *See supra* notes 122-26 and accompanying text.

IV. THE TORT IN PRACTICE

For the tort of breach of confidential relationship, a cause of action consists of the "'unconsented, unprivileged disclosure to a third party of nonpublic information that the defendant has learned within a confidential relationship.'"[142] This definition breaks down into four basic elements: (1) the existence of a confidential relationship, (2) disclosure of nonpublic information that the defendant learned within the relationship, (3) disclosure to a third party, and (4) possible defenses, including consent and statutory and public policy privileges. The following four sections discuss each of these elements as applied to the employment context. A fifth section discusses the possible remedies available for breach of confidential relationship.

A. *The Employment Relationship*

As discussed earlier, the confidential nature of the employment relationship would be a matter of law and not dependent on case-by-case analysis.[143] Thus, the court's inquiry here should simply be whether an employment relationship exists; once this fact is established, the court would assume that there is a confidential relationship between the parties.

Proving this element should be neither difficult nor controversial. Due to the frequency of vicarious liability in tort suits, courts already have a well-developed common law of agency concerning what constitutes an employer-employee relationship.[144] Although the adoption of this definition would exclude some individuals from bringing suit for breach of confidentiality—most notably independent contractors[145]—this limitation is both necessary and sound. The reconceptualized tort of breach of confidentiality turns in large part on a duty limited to the context of a special relationship.[146] As discussed earlier, entering into this

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[142] *Vassiliades*, 492 A.2d at 591 (quoting Vickery, *supra* note 11, at 1455); *see also* Street v. Hedgepath, 607 A.2d 1238, 1246 (D.C. 1992) (quoting this language to define the tort of breach of confidential relationship).

[143] *See supra* notes 108-09 and accompanying text.

[144] *See* RESTATEMENT (SECOND) OF AGENCY § 220(2) (1957) (stating the common criteria by which courts establish an employer-employee (master-servant) relationship, including such factors as the degree of control, the standard practice of the industry, the method of payment, and the intent of the parties).

[145] *See id.* § 220 cmt. e.

[146] *See* Vickery, *supra* note 11, at 1460.

relationship serves to place the parties on notice that information exchanged within this context should be held confidential.[147] This alleviates possible First Amendment concerns.[148] To the extent that the definition of employee is vague or subject to ad hoc case-by-case interpretation, it would be difficult to assume that the defendant implicitly agreed not to disclose information acquired through the relationship.[149] Moreover, the common law of agency is broad enough to include most situations in which the defendant would have access to sensitive information about the plaintiff. Indeed, some of the factors considered relevant to agency, such as the length of employment and the method of payment, are directly correlated with the likelihood that sensitive records are collected and maintained.[150]

B. *The Nature of Confidential Information*

The second element of proof for this tort presents a more difficult problem. What kind of information should a court consider "confidential" for the purpose of breach of confidentiality in the employment setting? While the type of information protected in the physician-patient or attorney-client context may be clear, the large variety of information typically kept by employers[151] makes the scope of protection more difficult.

Admittedly, employers hold some information that would not usually be considered "confidential," such as published telephone numbers of employees and perhaps the very fact that the individual is an employee. It can hardly be argued that an employer should be held liable for breach of confidentiality when the information disclosed was already public knowledge or widely accessible. Thus, an employee must demonstrate to the court that the information disclosed by her employer was not publicly known.[152]

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[147] *See supra* note 107 and accompanying text.

[148] *See supra* notes 111-16 and accompanying text.

[149] *See supra* notes 113-16 and accompanying text.

[150] *See* RESTATEMENT (SECOND) OF AGENCY § 220(2)(f), (g) (1957). Thus, a defendant who takes the time to maintain a personnel file and who keeps a record of payment regarding the plaintiff will more likely be deemed an employer under agency law.

[151] *See supra* part I.B.

[152] This requirement contrasts with the elements of common-law breach of privacy, where the plaintiff must prove that "private" facts were disclosed and that such a disclosure would be "offensive" to the reasonable person. *See* KEETON ET AL., *supra* note 14, § 117, at 856-57; Mironi, *supra* note 4, at 281-82; *supra* text accompanying notes 73-78. Instead of turning on the content of the disclosure,

Employers may be concerned that disclosures regarding termination of employment (that is, whether the former employee was laid off or fired) may expose them to liability. Under defamation law, an employer's statement that an employee was terminated is insufficient to establish a cause of action.[153] In the context of breach of confidentiality, however, an employer's disclosure of termination to a third-party would presumably be actionable. Some may be opposed to this result, arguing that this type of information is not analogous to that supplied by the employee for the purpose of employment and thus should not be deemed confidential. Rather, the kind of information generated by the employment relationship should be under the control of the employer as well as the employee.

This distinction, however, does not find support from the purpose of the tort of breach of confidentiality. Both kinds of information—that brought to the employment relationship and that generated by it—are potentially very sensitive and harmful to the employee if divulged. Employees should be able to control who knows and who does not know the details of their employment history; employers should not have the discretion to make this decision for them.[154]

A difficult question arises when employers are simply asked to verify information already held by third parties. For example, it is a common practice for financial institutions to confirm salary information provided in an application for credit.[155] Since the

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liability for this tort turns in part on whether such facts were publicly known.

[153] *See* Sadler v. Basin Elec. Power Coop., 409 N.W.2d 87, 89 (N.D. 1987) (holding that inferences which may have been drawn by third parties as a result of the termination do not give rise to a defamation cause of action).

[154] Some may argue that by making termination information more difficult to procure, employers will be less able to hire qualified employees and may even expose themselves to liability for negligent referral. *See* Swerdlow, *supra* note 47, at 1670-71 (arguing that employers should have a duty to warn future employers about employee misconduct). Such a concern, however, would be better addressed if employers insisted on recommendations from previous employers before hiring. While future employment may ultimately depend on an individual's willingness to allow her former employer to disclose information, the individual still maintains control over the information.

Note that this type of employer hard bargaining differs from a circumstance in which an employer refuses to hire or terminates an individual because she refuses to contract out of the confidential relationship. *See infra* notes 171-73 and accompanying text.

[155] *See* Letter from Citibank (South Dakota), N.A., (1993) ("By signing the application, . . . [y]ou authorize your employer . . . to release and/or verify information to Citibank . . . in order to determine your eligibility . . . .") (on file

employee has already disclosed the information to the third party, the employer's verification of these facts may not appear to be a "disclosure." Verification may not always be so straightforward, however, as leading allegations may be tantamount to disclosure. For example, if someone suspected an individual of drug use, an employer's response to a third-party's question such as "Can you confirm that your employee has taken leave for drug treatment?" would effectively amount to a disclosure. Thus, under this tort, the employer must confirm that its employee has consented to the third-party verification if it wants to avoid potential liability. This could be done either by securing the employee's consent to disclose or by requesting that the third party present a signed statement from the employee indicating the employee's authorization.[156]

A similar question arises concerning third-party inquiries for opinions regarding employees. Employers usually request references from previous employers as part of the application process. Under this tort, an employer could be held liable if he or she makes an unauthorized statement about a former employee. Thus, an employer would need to take additional precautions before giving references for its former employees—especially when the references are solicited by telephone. As in the case of verification, employers would need to either secure the employee's consent before giving a recommendation or request a statement from the third party to that effect.[157]

C. *Definition of "Third Party"*

In many circumstances, the issue of who constitutes a third party will be straightforward: any individual or entity other than the employer or employee will be a third party. Third parties could include banks, credit agencies, private investigators, solicitation organizations, and even employee relatives.[158] Difficulties arise,

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with author).

[156] Oftentimes, it will be in the employee's interest to have such information verified, as verification may be necessary for approval of a loan. In practice, therefore, an employee may wish to give her employer prior authorization to verify certain third-party inquiries. *See infra* notes 169-70 and accompanying text.

[157] Where employee consent is procured, this consent should not serve as a privilege against potential liability for defamation. *See supra* notes 45-48 and accompanying text.

[158] Union representatives and government officials, including officers of the court, would also be considered third parties. In many circumstances, however, disclosures to these parties would not create liability because of statutory provi-

however, when considering third parties with a close relationship to the employer, such as outside auditing firms, accountants, attorneys, and unemployment insurance personnel.[159]

In some instances, employers need to disclose confidential information about their employees in order to conduct their business.[160] If employers were required to gain employee consent every time they wanted to grant third-party access in the regular course of their business, this could significantly hamper business efficiency and control. Thus, courts should construe the term "third party" to exclude agents of the employer that perform business-related services for a legitimate business purpose.[161] Conceptually, these agents would be synonymous with the employer. Likewise, employer disclosures to its own employees or managers would be guided by the same business-related purpose definition of "third party."[162]

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sions mandating these types of disclosures. *See infra* note 165 and accompanying text.

[159] *Cf.* Multnomah Legal Servs. Workers Union v. Legal Servs. Corp., 936 F.2d 1547 (9th Cir. 1991). In this case, a local legal services employees' union sought to enjoin Legal Services Corporation (a federally created, nonprofit oversight corporation that distributes federal legal aid funds) from gaining access to the union's personnel files, claiming that such an action was not necessary to perform its contractual and statutorily mandated oversight duties. *See id.* at 1550-53. The court of appeals reversed a lower court's injunction and held that contract principles, statutes, and regulations did not require that the demand for documents by Legal Services Corporation be "'necessary and reasonable.'" *See id.* at 1556-57.

[160] Under defamation law, statements made by employers to third parties with a "common business concern" are privileged unless actual malice can be shown. *See, e.g.*, Pappas v. Air France, 652 F. Supp. 198, 202 (E.D.N.Y. 1986) (holding that statements made by an employer to the Department of Labor concerning an employee's unemployment benefits were privileged).

[161] A Connecticut statute requiring employee consent for disclosure of personnel files states that information should not be disclosed to "any person or entity not employed by or affiliated with the employer" and makes explicit exceptions for "a third party that maintains or prepares employment records or performs other employment-related services for the employer" and for disclosures made in "defense of personnel-related complaints against the employer." CONN. GEN. STAT. ANN. § 31-128f(1)-(2) (West 1987).

[162] Under privacy law, statements made to certain employees and members of management may be actionable where there is no reason to make such statements. *See* Payton v. City of Santa Clara, 132 Cal. App. 3d 152, 154 (Ct. App. 1982) (holding that an employee's right to privacy was violated when his employer posted an interoffice memo regarding the employee's dismissal). Under defamation law, such statements are usually privileged. *See* Grynberg v. Alexander's Inc., 519 N.Y.S.2d 838, 839 (App. Div. 1987) (holding that an employer's statement to certain employees regarding plaintiff's termination was privileged), *appeal denied*, 521 N.E.2d 444 (N.Y. 1988). When statements are made

D. *Statutory Law and Public Policy Exceptions*

If a court extends the common-law tort of breach of confidentiality to the employment context, this would not alter existing federal and state law that may mandate employer disclosure in certain circumstances.[163] Employers would not be held liable for breach of confidentiality when disclosing personnel records to third parties pursuant to judicial orders or parties' requests for documents during pretrial discovery.[164] Likewise, disclosures made in response to a federal or state statute would not be actionable—most notably disclosures to the Department of Labor and to union representatives.[165] Of course, employers and employees

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to those who do not need to know the information, this privilege may be lost. *See* Haddad v. Sears, Roebuck & Co., 526 F.2d 83, 85 (6th Cir. 1975) (holding that an employer's statement about an employee's misdeeds to other employees was not privileged where the employer had no legitimate reason to disclose such information).

[163] A Connecticut statute requiring employee consent for disclosure makes exceptions where the disclosure is made "pursuant to a lawfully issued administrative summons or judicial order, including a search warrant or subpoena, or in response to a government audit . . . ; to comply with federal, state, or local laws or regulations; or . . . where the information is disseminated pursuant to the terms of a collective bargaining agreement." CONN. GEN. STAT. ANN. § 31-128f.

[164] *See, e.g.*, FED. R. CIV. P. 34(a) (defining the scope of production of documents for pretrial discovery).

[165] Employers regulated by the Occupational Health and Safety Act must make available to the Secretary of Labor and Secretary of Health and Human Services all relevant records regarding employees, including medical and toxic exposure data. *See* 29 U.S.C. § 657(c)(1) (1988); 42 C.F.R. § 85.5(a) (1992); United States v. Westinghouse Elec. Corp., 638 F.2d 570, 580 (3d Cir. 1980) (allowing federal officials access to past and present employee medical records due to suspected workplace health hazard and rejecting employer's assertion that such act violated employee privacy).

Federal contractors required to administer affirmative action programs must provide the government with a listing of all job titles with wage rates or salary ranges, sex, and race or ethnic background of the employees holding those positions. *See* 41 C.F.R. § 60-2.11(a) (1992). If an employer is concerned about the confidentiality of this information, then "alphabetic or numeric coding or the use of an index of pay and pay ranges are acceptable" for determining whether the contractor is complying with federal regulations. *Id.* § 60-60.4(a). In addition, employers have the opportunity to identify any information "which they believe is not subject to disclosure" under the Freedom of Information Act. *Id.* § 60-60.4(d).

Employer disclosures to union representatives are to a large degree regulated by the National Labor Relations Act. *See* 29 U.S.C. §§ 151-169 (1988). In interpreting the Act, the Supreme Court held that the duty to bargain collectively and in good faith imposed on the employer a duty to provide relevant information to labor unions. *See* NLRB v. Truitt Mfg. Co., 351 U.S. 149, 152 (1956). In Detroit Edison Co. v. NLRB, 440 U.S. 301, 318 (1979), however, the Court suggested that this duty should be balanced against the confidentiality interests of

may still take advantage of any special privilege that exists regarding the disclosure of personnel files.[166]

Difficulty may arise when it is not entirely clear if an employer would be required to disclose as a matter of law. One can foresee a situation in which an employer fears a potential contempt of court charge if it does not disclose and a potential suit for breach of confidentiality if it does. For this reason, an employer should not be liable for breach of confidentiality when it makes a good faith effort to comply with court orders or rules.[167]

In the case of an on-the-job medical emergency, employers may need to disclose confidential information to medical personnel, such as existing medical conditions, prescription drug use, or a history of illegal drug use. As a matter of public policy, and in the interest of informed medical treatment, courts should not subject employers to liability under these circumstances.[168]

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the employer.

In a related issue, federal circuit courts are currently split regarding whether the federal government must supply employee addresses to unions under the Federal Service Labor-Management Relations statute. *See* 5 U.S.C. § 7114(b)(4)(B) (1988) (stating that federal agencies must furnish to unions such data as is "necessary for full and proper . . . scope of collective bargaining"); United States Dep't of the Navy v. Federal Labor Relations Auth., 975 F.2d 348, 355 (7th Cir. 1992) (holding that disclosure was prohibited by Exemption 6 of the Freedom of Information Act); Federal Labor Relations Auth. v. Department of the Navy, 963 F.2d 124, 125 (6th Cir. 1992) (same). *But see* Federal Labor Relations Auth. v. United States Dep't of Navy, 958 F.2d 1490, 1497 (9th Cir. 1992) (holding that disclosure was mandated by the Freedom of Information Act).

[166] In some states, employers enjoy a privilege against aiding discovery or giving testimony regarding confidential employee information. *See, e.g.*, El Dorado Sav. & Loan Ass'n v. Superior Court, 235 Cal. Rptr. 303, 305 (Ct. App. 1987) (nullifying lower court order compelling production of an entire employee personnel file in an employment discrimination suit on the grounds that consideration must first be given to whether less intrusive means would yield the information sought); Cutter v. Brownbridge, 228 Cal. Rptr. 545, 549 (Ct. App. 1986) ("In the context of discovery of confidential information in personnel files, even when such information is directly relevant to litigation, discovery will not be permitted until a balancing of the compelling need for discovery against the fundamental right of privacy determines that disclosure is appropriate.").

[167] This good-faith exception should not extend to voluntary disclosures made to police during the course of an investigation, unless made pursuant to the employer's own culpability. *Cf.* Niles v. Big Sky Eyewear, 771 P.2d 114, 117 (Mont. 1989) (holding that employer's statements should not be privileged in a defamation suit where the employer made an unsolicited complaint to the police).

[168] *Cf.* CONN. GEN. STAT. ANN. § 31-128f(4) (providing an exception to required employee consent where disclosure is made "in response to an apparent medical emergency or to apprise the employee's physician of a medical condition of which the employee may not be aware").

E. *Consent and Contracting Out of Liability*

While the tort of breach of confidentiality would give employees some assurance that their employers will not disclose information to third parties, there are several circumstances in which employees may actually want employers to disclose information about them—most typically the verification of salary data to financial institutions and references for future employment.[169] In these cases, employees would "contract out" of the confidential relationship by giving their employers consent to disclose specified information to third parties.[170]

The potential exists, however, for employers to coerce employees to contract out of the relationship. An employer could make all potential and current employees sign a comprehensive consent statement as a condition of employment thus absolving the employer of all liability for breach of confidentiality.[171] In jurisdictions that may recognize this tort, however, courts would likely find such practices contrary to public policy. When employers

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[169] *See supra* notes 155-56 and accompanying text.

[170] The issue of waiver is common in other confidential relationship contexts. *See, e.g.*, Street v. Hedgepath, 607 A.2d 1238, 1248 (D.C. 1992) (holding that waiver of physician-patient relationship privilege by filing medical malpractice action was consent to disclosure of confidential information); Doe v. Roe, 588 N.Y.S.2d 236, 243 (Sup. Ct. 1992) (stating that waiver of statutory physician-patient privilege may be accomplished by either patient's express consent or by commencement of personal injury action); Fedell v. Wierzbieniec, 485 N.Y.S.2d 460, 462 (App. Div. 1985) (holding that plaintiff waives confidential relationship of physician-patient when bringing a personal injury action against physician).

Consent would most likely be in writing, although oral consent would be legally sufficient if provable. Employers would most likely insist on a signed statement as a shield against liability in cases where the facts are in dispute.

[171] At least one employer already "asks" employees to sign a broadly worded consent form for the release of medical records to insurance companies. *See* Mubarark S. Dahir, *Your Health, Your Privacy, Your Boss*, PHILA. CITY PAPER, May 28-June 4, 1993, at 10. The text of the records authorization clause states:

> To all physicians, surgeons and other medical practitioners, all hospitals, clinics and other health care facilities, all insurance carriers, insurance data service organizations, all pension and welfare fund administrators, my current employer, all of my former employers and all other persons, agencies or entities who may have records or evidence relating to my physical or mental condition; I hereby authorize release and delivery of any and all information, records and documents (confidential or otherwise) with respect to my health and health history that you or any of you, now have or hereafter obtain to the administrator of an employee benefit plan sponsored by [the employer].

Id. at 11.

force their potential employees to waive all breach of confidentiality claims, courts could refuse to recognize such agreements in any future litigation.[172] In instances where an employer dismisses an employee for failure to grant authorization or initiates an action based on breach of confidentiality, courts could treat the failure to hire or the dismissal as a wrongful discharge—possibly granting the employee back pay or reinstatement.[173]

F. *Remedies*

In many cases, damages stemming from an employer's breach of confidentiality will take the form of mental anguish and negligent emotional distress.[174] For example, when an employer discloses an employee's criminal record to a third party, the damages would compensate the victim for the humiliation and loss of standing among peers that results from the disclosure. The employee's recovery should not be contingent on accompanying physical harm—as is the case in other tort contexts—because the nature of the breach of confidentiality is inherently mental and subjective.[175]

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[172] *Cf.* O'Connor v. Police Comm'r, 557 N.E.2d 1146, 1150 (Mass. 1990) (noting that the reasonableness of the conditions under which consent was given is an appropriate element to consider in the balancing inquiry that determines whether a right to privacy was violated).

[173] Several jurisdictions recognize wrongful discharge actions based on public policy grounds alone. *See, e.g.*, Sugarman v. RCA Corp., 639 F. Supp. 780, 784 (M.D. Pa. 1985) (finding an exception to the at-will doctrine where important issues of public policy are raised); Glaz v. Ralston Purina Co., 509 N.E.2d 297, 300 (Mass. App. Ct. 1987) (holding that there is an exception to the at-will doctrine where clearly defined and established public policy is threatened by the employer's action); Cilley v. New Hampshire Ball Bearings, Inc., 514 A.2d 818, 821 (N.H. 1986) (holding that there is an exception to the at-will doctrine where the discharge results from performing an act that public policy encourages or from refusing to perform an act that public policy discourages); Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1042 (Utah 1989) (finding an exception to the at-will doctrine where an employee is discharged for reasons contrary to established and substantial public policy). *But see* Gantt v. Sentry Ins., 824 P.2d 680, 687-88 (Cal. 1992) (holding that public policy claims must be grounded in a statute or constitutional provision).

[174] *See* Perez v. Kirk & Carrigan, 822 S.W.2d 261, 266 (Tex. Ct. App. 1991) (holding that plaintiff showed damages of emotional distress and mental anguish where plaintiff's attorney breached duty of confidentiality by revealing information to district attorney).

[175] *See* National Bonding Agency v. Demeson, 648 S.W.2d 748, 750 (Tex. Ct. App. 1983) (holding that award of damages for mental anguish in invasion of privacy action was valid because injuries in such actions are essentially mental and subjective even though general rule in Texas denied such damages absent physical injury); *see also* DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 7.3, at 528

There may be some instances, however, in which the employer's breach of confidentiality does not actually cause mental anguish or emotional distress. For example, an employer could disclose an employee's unlisted telephone number to a creditor. Such an action may cause significant annoyance, but it would probably be difficult to prove that it caused anything more. Nonetheless, even where employers cause only "trivial" harm through their disclosures, there is still a sense of loss of control over one's personal information.[176] For this reason, courts should award at least nominal damages for these disclosures.[177]

Occasionally, the employer's disclosure may be so egregious or intentionally harmful that punitive or exemplary damages would be in order.[178] Courts have found that punitive damages are appropriate for breach of confidentiality when the defendant's conduct is sufficiently blameworthy.[179] Such damages would presumably be justified in a case where an employer purposefully discloses information to harm or humiliate an employee. For example, a court or jury may impose punitive damages where an employer "blacklists" an employee by disclosing that the employee has filed a worker compensation claim.[180]

(1973) (stating that for torts based on protection of personality or dignitary interests, including invasion of privacy, "damages are 'presumed' or the wrong is said to be damage in and of itself"). Even though the authorities cited above concern invasion of privacy and not breach of confidentiality, courts do not draw a distinction between the two for purposes of damages. *See* Perez v. Kirk & Carrigan, 822 S.W.2d at 267 (citing to privacy tort case to support proposition that emotional distress and mental anguish damages were available for breach of confidentiality).

[176] *See supra* notes 15-19 and accompanying text (discussing the value of personal autonomy).

[177] *See* Hall v. Post, 355 S.E.2d 819, 825 (N.C. Ct. App. 1987) (stating that relief for tortious invasion of privacy entitles plaintiff to "at least nominal damages"). *But see* Hooper v. Gill, 557 A.2d 1349, 1353 (Md. Ct. Spec. App. 1989) (stating that while plaintiff was arguably entitled to nominal damages for doctor's breach of confidentiality, amount recoverable would be "absolutely de minimis in view of the costs in judicial time of retrial on the sole issue of nominal damages").

[178] This is not to suggest that many employers maliciously or even intentionally disclose information about their employees. Admittedly, most disclosures occur because of employer carelessness. In the context of a confidential relationship, however, such behavior still amounts to the breach of a duty not to disclose.

[179] *See, e.g.*, Doe v. Roe, 599 N.Y.S.2d 350, 356 (App. Div. 1993) (holding that where doctor discloses patient's HIV status, punitive damages are "recoverable in common-law actions for breach of confidentiality or breach of fiduciary duty provided that the defendant's conduct is sufficiently blameworthy").

[180] *See supra* note 3 and accompanying text.

CONCLUSION

Currently, the patchwork of statutes and common-law doctrines provides wholly inadequate safeguards and remedies for employees who suffer from disclosure of sensitive information at the hands of their employers. While federal and state legislation would perhaps be desirable in this regard, the recently developed common-law tort of breach of confidentiality provides courts with a legal framework with which to address this growing problem. Just as courts followed Warren and Brandeis's call to "define anew" the protection of person and property in the early part of this century,[181] today's judiciary should expand the tort of breach of confidentiality to protect the privacy interests of the American workforce.

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[181] Warren & Brandeis, *supra* note 9, at 193.