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EMPLOYEE FIDUCIARY DUTIES: ONE SIZE DOES NOT FIT ALL

Leslie Larkin Cooney[*]

This article examines the law surrounding the fiduciary duties owed by non-officer employees to their employers and the remedies imposed for a breach of those duties. It is the author's contention that applying the same agency principles to all employees regardless of their level of power or ability to exercise discretion or affect the employer's interests generates an uncalled for advantage to the employer.[1]

Employment law in the United States has evolved from the English law of master and servant, and agency is defined as the fiduciary relationship arising when a principal manifests assent to an agent that the agent will act subject to the principal's control, on the principal's behalf and the agent consents to act.[2] While agency encompasses a range of circumstances and relationships, the Restatement of Agency (Third) indicates its elements are present in the employer-employee relationship.[3] "The common law of agency, however, additionally encompasses the employment relation, even as to employees whom an employer has not designated to contract on its behalf or otherwise to inte-

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[1] This premise applies only to non-officer employees. Officers and other employees occupying positions of confidence and trust should be subject to the broad application of agency's fiduciary duties and applicable remedies for breach.

[2] RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006). "Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." *Id. See* Walton v. United States, 80 Fed. Cl. 251, 273–74 (Fed. Cl. 2008).

[3] RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (2006); Deborah A. DeMott, *Disloyal Agents*, 58 ALA. L. REV. 1049, 1051 (2007). "Thus, agents for purposes of common law agency include lawyers, real estate brokers, stock brokers, officers of legal entities of all sorts, and employees." *Id. See* Eckard Brandes, Inc. v. Riley, 338 F.3d 1082, 1085 (9th Cir. 2003); Judah v. Reiner, 744 A.2d 1037, 1039–40 & n.5 (D.C. 2000). *But see* Haas v. Caster, 66 N.W. 2d 878, 880 (Iowa 1954) (noting that an employee is not always an agent for the employer); Iowa Power & Light Co. v. Abild Constr. Co., 144 N.W.2d 303, 315 (Iowa 1966) (stating there is a very fine line between agent and employee).

ract with parties external to the employer's organization."[4] Since agency is a fiduciary relationship, if employees are agents,[5] then all employees have a fiduciary relationship with their employer.[6] As agents of the employers, all employees owe broad fiduciary duties to their employers.[7] The scope of the duties defined by this relationship is outlined in the Restatement of Agency (Third).

The Restatement of Agency (Third) expresses a general fiduciary standard and separates an agent's duties into duties of loyalty and duties of performance.[8] This general fiduciary standard requires an employee to act loyally for the employer's benefit in all matters connected with the relationship.[9] An agent's specific duties of loyalty restrict an employee from acquiring any material benefit from a third party in connection with transactions conducted or other actions taken on behalf of the employer or otherwise through the use of the employee's posi-

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[4] RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (2006).

[5] Nationwide Mut. Ins. Co., v. Darden, 503 U.S. 318, 322-23 (1992); *See* Richard J. Hunter, Jr., *An "Insiders" Guide to the Legal Liability of Sports Contest Officials,* 15 MARQ. SPORTS L. REV. 369, 398 (2005).

[6] H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 165–66 (1877) (*reprinted in* R.H. HELMHOLZ, BERNARD D. REAMS, JR., HISTORICAL WRITINGS IN LAW AND JURISPRUDENCE 18 (W.S. Hein 1981)). Wood's Treatise states:

> On the part of the servant, there is an implied obligation to enter the master's service and serve him diligently and faithfully, to obey all his reasonable commands, treat him respectfully, conduct himself morally in his master's family, and to perform the duties incident to his employment honestly, with ordinary care, and due regard to his master's interest and business.

Id. at 166.

[7] Konrad Lee, *Anti-Employer Blogging: Employee Breach of the Duty of Loyalty and the Procedure for Allowing Discovery of a Blogger's Identity Before Service of Process Is Effected,* 2006 DUKE L. & TECH REV. 2, 11 (2006).

[8] RESTATEMENT (THIRD) OF AGENCY §§ 8.01–8.12 (2006). *See* Abetter Trucking Co. v. Arizpe, 113 S.W.3d 503, 510 (Tex. Ct. App. 2003).

[9] RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006). "An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship." *Id.* The duty of loyalty derives from the basic obligation of faithful service found in English master and servant law and has been a part of our earliest common law. William Lynch Schaller, *Jumping Ship: Legal Issues Relating to Employee Mobility in High Technology Industries,* 17 LAB. LAW. 25, 31 (2001) (citing Robert J. Steinfeld, *The Invention of Free Labor: The Employment Relation in English and American Law and Culture,* 13-50-1870, at 169 (1991)). *See* Ray Mart Inc. v. Stock Bldg. Supply of Tex. LP, No. 07-50609, 2008 WL 4809471, at *6 (5th Cir. Nov. 5, 2008); Nat'l R.R. Passenger Corp. v. Veolia Transp. Servs., Inc., 592 F. Supp. 2d 86, 95 (D.D.C. 2009).

tion[10] and restricts the employee from dealing as an adverse party or on behalf of one in any transaction connected with the employment.[11] The Restatement of Agency (Third) also obliges employees to refrain from competing with the employer and from acting for or assisting competitors.[12] If, for the employee's own purposes or the purposes of a third party, an employee uses the employer's property or communicates confidential information, the employee violates an agent's duty of loyalty.[13] An employer may consent to conduct that would otherwise be disloyal, but an employee must act in good faith in obtaining this consent, must disclose all material facts and must otherwise deal fairly with the employer.[14] An employee may take actions dur-

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[10] RESTATEMENT (THIRD) OF AGENCY § 8.02 (2006). "An agent has a duty not to acquire a material benefit from a third party in connection with transactions conducted or other actions taken on behalf of the principal or otherwise through the agent's use of the agent's position." *Id. See Abetter*, 113 S.W.3d at 510; Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 200 (Tex. 2002).

[11] RESTATEMENT (THIRD) OF AGENCY § 8.03 (2006). "An agent has a duty not to deal with the principal as or on behalf of an adverse party in a transaction connected with the agency relationship." *Id. See Abetter*, 113 S.W.3d at 510; *Johnson*, 73 S.W.3d at 200; Television Events & Mktg. Inc. v. Amcon Distrib. Co., 526 F. Supp. 2d 1118, 1126–28 (D. Haw. 2007).

[12] RESTATEMENT (THIRD) OF AGENCY § 8.04 (2006). "Throughout the duration of the an agency relationship, an agent has a duty to refrain from competing with the principal and from taking action on behalf of or otherwise assisting the principal's competitors." *Id.* "During that time, an agent may take action, not otherwise wrongful, to prepare for competition following termination of the agency relationship." *Id. See* Rash v. J.V. Intermediate, Ltd., 498 F.3d 1201, 1209–10 (10th Cir. 2007) (stating that an employee's failure to disclose his ownership stake in a subcontractor company hired by the principal resulted in the violation of the employee's fiduciary duty).

[13] RESTATEMENT (THIRD) OF AGENCY § 8.05 (2006). "An agent has a duty (1) not to use property of the principal for the agent's own purposes or those of a third party; and, (2) not to use or communicate confidential information of the principal for the agent's own purposes or those of a third party." *Id. See* Synergetics, Inc. v. Hurst, 477 F.3d 949, 959 (8th Cir. 2007) (stating that a former employees' use of confidential trade secret information to design competitive products violated their duty of loyalty to their former employers).

[14] RESTATEMENT (THIRD) OF AGENCY § 8.06 (2006).

> (1) Conduct by an agent that would otherwise constitute a breach of duty as stated in §§ 8.01, 8.02, 8.03, 8.04, and 8.05 does not constitute a breach of duty if the principal consents to the conduct, provided that
>
> (a) in obtaining the principal's consent, the agent
>
> (i) acts in good faith,
>
> (ii) discloses all material facts that the agent knows, has reason to know, or should know would reasonably affect the principal's judgment unless the principal has manifested that such facts are al-

ing employment to prepare for competition after termination of employment, provided such activity is not otherwise wrongful.[15] An employee who acts for more than one employer in a transaction between employers has a duty to act in good faith and deal fairly with each employer, disclosing to each that the employee works for the other as well as all other facts that would reasonably affect either employer.[16]

An agent's duties of performance require an employee to comply with the express and implied terms of any employment contract,[17] comply with all lawful instructions,[18] and act with

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ready known by the principal or that the principal does not wish to know them, and

(iii) otherwise deals fairly with the principal; and

(b) the principal's consent concerns either a specific act or transaction, or acts or transactions of a specified type that could reasonably be expected to occur in the ordinary course of the agency relationship.

(2) An agent who acts for more than one principal in a transaction between or among them has a duty

(a) to deal in good faith with each principal,

(b) to disclose to each principal

(i) the fact that the agent acts for the other principal or principals, and

(ii) all other facts that the agent knows, has reason to know, or should know would reasonably affect the principal's judgment unless the principal has manifested that such facts are already known by the principal or that the principal does not wish to know them, and

(c) otherwise to deal fairly with each principal.

Id. *See* United Teachers Assocs., Ins. Co. v. MacKeen & Bailey Inc., 99 F.3d 645, 650 (5th Cir. 1996) (holding that an actuary giving advice, with permission, to a competing insurance company during negotiations of a purchase of that particular company, which resulted in the failure of negotiations, violated the actuaries fiduciary duty to the insurance company with which he was contracted).

[15] RESTATEMENT (THIRD) OF AGENCY § 8.04 (2006). *See* Kopka, Landau & Pinkus v. Hansen, 874 N.E.2d 1065, 1071–72 (Ind. Ct. App. 2007) (stating that an attorney planning to leave his firm did not breach his fiduciary duty by questioning other employees about their desire, if any, to leave the firm and work for his new firm in the future); Nat'l Rejectors, Inc. v. Trieman, 409 S.W.2d 1, 26–28 (Mo. 1966) (stating that employees who organized, planned and incorporated a new competing company while still employed did not breach their fiduciary duties).

[16] RESTATEMENT (THIRD) OF AGENCY § 8.06 (2006). *See* Television Events & Mktg., Inc. v. Amcon Distrib. Co., 526 F. Supp. 2d 1118, 1133–34 (D. Haw. 2007).

[17] RESTATEMENT (THIRD) OF AGENCY § 8.07 (2006). "An agent has a duty to act in accordance with the express and implied terms of any contract between the agent and the principal." *Id.* *See* Hendricks Prop. Mgmt. Corp. v. Birchwood Props. Ltd. P'ship, 741 N.W.2d 461, 465–66 (N.D. 2007).

the care, competence and diligence exercised by employees similarly situated.[19] The employee must act reasonably and avoid actions likely to damage the employer[20] and must act only within the scope of the employee's actual authority.[21] The employee has the duty to provide information material to the employment and its functions.[22] Duties of performance relate objectively to each employee's specific obligations and provide standards specific to that particular employment relationship. For example, although the overarching duties of performance are the same whether the employee is an entry-level stock clerk, a mid-level

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[18] RESTATEMENT (THIRD) OF AGENCY § 8.09(2) (2006). "An agent has a duty to comply with all lawful instructions received from the principal and persons designated by the principal concerning the agent's actions on behalf of the principal." *Id. See* Appleby v. Kewanee Oil Co., 279 F.2d 334, (10th Cir. 1960) (reaffirming that an agent must obey any lawful instructions given by the principal).

[19] RESTATEMENT (THIRD) OF AGENCY § 8.08 (2006).

> Subject to any agreement with the principal, an agent has a duty to the principal to act with the care, competence, and diligence normally exercised by agents in similar circumstances. Special skills or knowledge possessed by an agent are circumstances to be taken into account in determining whether the agent acted with due care and diligence. If an agent claims to possess special skills or knowledge, the agent has a duty to the principal to act with the care, competence, and diligence normally exercised by agents with such skills or knowledge.

Id. See Carrier v. McLlarky, 693 A.2d 76, 78 (N.H. 1997) ("Agents have a duty to conduct the affairs of the principal with a certain level of diligence, skill, and competence.").

[20] RESTATEMENT (THIRD) OF AGENCY § 8.10 (2006). "An agent has a duty, within the scope of the agency relationship, to act reasonably and to refrain from conduct that is likely to damage the principal's enterprise." *Id. See* McGarry v. Saint Anthony of Padua Roman Catholic Church, 704 A.2d 1353, 1357–58 (N.J. Super. Ct. App. Div. 1998) (stating that even if an agent's actions are satisfactory, an agent's conduct that sheds improper light or can damage the principal breaches an agent's fiduciary duty).

[21] RESTATEMENT (THIRD) OF AGENCY § 8.09(1) (2006). "An agent has a duty to take action only within the scope of the agent's actual authority." *Id. See* Baranksi v. Fifteen Unknown Agents of ATF, 195 F. Supp. 2d 862, 866 (W.D. Ky. 2002) (noting that executing and serving search warrants is within the scope of duty for ATF agents).

[22] RESTATEMENT (THIRD) OF AGENCY § 8.11 (2006).

> An agent has a duty to use reasonable effort to provide the principal with facts that the agents knows, has reason to know, or should know when
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> (1) subject to any manifestation by the principal, the agent knows or has reason to know that the principal would wish to have the facts or the facts are material to the agent's duties to the principal; and
>
> (2) the facts can be provided to the principal without violating a superior duty owed by the agent to another person.

Id. See United States v. Stein, 463 F. Supp. 2d 459, 461–62 (S.D.N.Y. 2006); Sotheby's Int'l Realty, Inc. v. Black, 472 F. Supp. 2d 481, 486–87 (S.D.N.Y. 2006).

sales manager, or an upper-level executive vice president, it is easy to distinguish among the requirements which would satisfy the fulfillment of such duties at each level, and it is obvious that the requirements become more onerous as the levels of employment rise.[23] This is not so easily distinguishable or obvious when one looks at employees' fiduciary duties of loyalty that serve functions distinct from those of performance.[24] Nonetheless, disloyalty by employees is likely to fall into two basic categories: the first stemming from a conflict between the employer's interests and those of the employee, and the second stemming from conflicting interests from multiple or successive employers.[25] The majority of cases involving alleged breaches of the duty of loyalty by employees fall into the first category due to the sheer fact that most employees will be acting for only one employer[26]—unlike other non-employee agents who more often work for multiple principals. Of course, as the American workforce becomes more mobile, and this mobility is likely to grow during today's recessionary times, the amount of breaches of employee loyalty arising from conflicting interests from multiple employers will most certainly increase.[27] Moreover, the reach of

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[23] Interestingly, although at-will employment does not bind an employee to performance, the duty of loyalty has been found to attach once performance begins. *See* Condon Auto Sales & Serv., Inc. v. Crick, 604 N.W.2d 587, 599 (Iowa 1999).

[24] DeMott, *supra* note 3, at 1057–58 (generalizing that the duty of loyalty acts as "an exclusively subsidiary function" in that, regardless of the agent's completion of other duties, the agent's actions can still be scrutinized as to their loyalty throughout the process of completing those duties). *See* Bee Load Ltd. v. British Broad., No. CV03-417, 2005 WL 3338923, at *2 (Me. Super. Ct. Sept. 20, 2005) (noting that "the duty of loyalty and the duty of care are distinct elements found in a fiduciary relationship"); Meyers v. Sudfeld, No. Civ. A.05-2970, 2006 WL 401855, at *6 (E.D. Pa. Feb. 21, 2006) (stating that "a claim of breach of the fiduciary duty of loyalty represents a distinct cause of action . . . which implicates a duty of care").

[25] DeMott, *supra* note 3, at 1054 (citing Matthew Conaglen, *The Nature and Function of Fiduciary Loyalty*, 121 L.Q.R. 452, 465 (2005)).

[26] Fatland v. Quaker State Corp., 62 F.3d 1070 (8th Cir. 1995).

[27] *See generally* Jill Rubery, Jill Earnshaw & Mick Marchington, *Blurring the Boundaries to the Employment Relationship: From Single to Multi-Employer Relationships*, *in* FRAGMENTING WORK: BLURRING ORGANIZATIONAL BOUNDARIES AND DISORDERING HIERARCHIES at 64 (Mick Marchington et al. eds., Oxford: Oxford University Press, 2005) ("Where employees of one organization work in environments open to pressure and influence from other employers, the relevance of key notions of . . . loyalty . . . are called into question."). *See also* Alfred W. Blumrosen & Ruth G. Blumrosen, *First Statistical Report on Intentional Job Discrimination Against Women*, 25 WOMEN'S RTS. L. REP. 63, 69 (2003) ("[I]n the present era, where job security is no longer so common

the duty encompasses any employee conduct that is inconsistent with the employer's interests and, therefore, it arguably extends to harmful speech,[28] insubordination,[29] neglect,[30] disruption of employee/employer relations,[31] or discrediting the employer's name,[32] product[33] or reputation.[34]

Courts sometimes indicate that the employee accused of breaching his or her fiduciary duties was an officer, executive, or manager and the use of such facts would seem to attach some

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and employee "loyalty" has been undermined by changes in the employment relationship, an increasing proportion of employees are likely to be mobile."). *But see*, Yuval Feldman, *Experimental Approach to the Study of Normative Failures: Divulging of Trade Secrets by Silicon Valley Employees*, 2003 U. ILL. J.L. TECH. & POL'Y. 105, 119 (2003) (positing employers in the Silicon Valley accept employee disclosure of trade secrets and do not sue former employers because the employers remember how they began their own careers).

[28] When one is fired because of information appearing on one's website or in a blog, the employee has been "dooced." Laura DiBiase, *To Blog or Not to Blog?*, AM. BANKR. INST. J., Nov. 24, 2005, at 32. Some states have enacted legislation making it harder for employees to be terminated for off-duty conduct. *See* COLO. REV. STAT. ANN. § 24-34-402.5 (West 1990) (prohibiting an employer from terminating "any employee due to that employee's engaging in any lawful activity off the premises of the employer during non-working hours"); N.Y. LAB. LAW § 201-d(2)(c) (McKinney 2003) (prohibiting employer discipline or termination for an employee's "legal recreational activities outside work hours"); N.D. CENT. CODE § 14-02.4-03 (2005) (prohibiting discrimination based on an employee's lawful off-duty activities). *See* Aaron Kirkland, *"You Got Fired? On Your Day Off?!": Challenging Termination of Employees for Personal Blogging Practices*, 75 UMKC L. REV. 545 (2006) (calling for a federal approach to protect off-duty activities which are unrelated to job performance).

[29] Grigsby v. Kane, 250 F. Supp. 2d 453, 455 (M.D. Pa. 2003) (finding two former attorneys for Pennsylvania's Bureau of Professional Licensing and Occupational Affairs were properly terminated for speaking out against a new quota system used to determine "which healthcare professionals should be prosecuted for violating the law").

[30] Long v. Ohio Dep't of Job & Family Servs., 907 N.E.2d 373, 381 (Ohio Ct. App. 2009) (stating that standards of employee conduct for employees of the Dep't are violated by "incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of public, neglect of duty, acts of misfeasance or nonfeasance").

[31] *See generally* Alberti v. County of Nassau, 393 F. Supp. 2d 151 (E.D.N.Y. 2005) (finding an employee's political affiliation may lead to disruption of employee/employer relations when the employment concerns policymaking and political connections).

[32] Curran v. Cousins, 509 F.3d 36 (1st Cir. 2007) (holding an employee can violate his/her duty by discrediting the employer's name through posting messages on an internet blog).

[33] Marsh v. Delta Air Lines, Inc., 952 F. Supp. 1458 (D. Colo. 1997) (finding an airline employee violated a duty not to discredit an employer's product by sending a letter to a newspaper criticizing the airline).

[34] Tory A. Weigand, *Employee Duty of Loyalty and the Doctrine of Forfeiture*, 42 BOSTON BAR J. 6, 7 (Sept./Oct. 1998).

importance to the level of an employee's position when adjudicating fiduciary duties.[35] For example, when applying Illinois law, a federal district court pointed to the fact that the employee was highly paid, had access to the employer's confidential information such as customer lists, and had authority to place orders and sell and distribute products before concluding that the employee was liable for a breach of a fiduciary duty.[36] Conversely, the court in *Dalton v. Camp*[37] did not discuss whether a former manager owed the fiduciary duties of an agent to his employer and whether the alleged conduct formed a basis for a breach of fiduciary duties.[38] Instead, the court implicitly established the presumption that a fiduciary relationship *does not exist* between employer and employee.[39] The court further clarified that it did not sanction an independent action for breach of duty of loyalty and stated that the manager's disloyalty was only relevant as part of the employer's defense in an action for wrongful termination.[40]

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[35] *E.g.*, Beverly Hills Concepts, Inc. v. Schatz & Schatz, 717 A. 2d 724, 730 (Conn. 1998) (holding that, unlike the firm's partner, the junior associate did not have the special trust with the client to conclude that there is a fiduciary duty); Sun Life Assurance Co. of Can. v. Coury, 838 F. Supp. 586 (S.D. Fla. 1993); Pride Mobility Prods. Corp. v. Dylewski, No. 3:08-cv-0231, 2009 WL 249356, at *18 (M.D. Pa. 2009) ("[D]efendants were shareholders, employees, directors, and managers of the plaintiff corporation and clearly owed the plaintiff corporation the fiduciary duties commensurate with their respective positions."); ATC Distrib. Group, Inc. v. Whatever It Takes Transmissions & Parts, Inc., 402 F.3d 700, 716 (6th Cir. 2005) (finding that the district court improperly granted summary judgment to employee defendants *solely* because it did not need to consider the employees' "alleged positions of trust and access to confidential information" on the grounds that salespeople cannot owe fiduciary duties to an employer); Talenburst, Inc. v. Collabera, Inc., 567 F. Supp. 2d 261, 265–67 (D. Mass. 2008) (stating that Massachusetts law of employee-employer fiduciary duties depends on an evaluation of the whether the employee held "positions of trust and confidence"); *c.f.* Chelsea Industries, Inc. v. Gaffney, 449 N.E.2d 320, 326 (1983) (stating "Employees occupying a position of trust and confidence owe a duty of loyalty to their employer and must protect the interests of the employer.").

[36] Diamond Blade Warehouse, Inc. v. Paramount Diamond Tools, Inc., 420 F. Supp 2d. 866, 871 (N.D. Ill. 2006). The court granted injunctive relief to an employer when a former employee violated the restrictive covenants of his employment agreement and breached his fiduciary duty by soliciting customers and other employees. *Id.*

[37] 548 S.E. 2d 704 (N.C. 2001).

[38] *See id.* at 708; Bret L. Grebe, *Fidelity at the Workplace: The Two-faced Nature of the Duty of Loyalty under Dalton v. Camp*, 80 N.C. L. REV. 1815, 1826 (2002).

[39] Bret L. Grebe, *supra* note 38, at 1821.

[40] *Dalton*, 548 S.E.2d at 709. The former employee had responsibilities "not unlike those of employees in other businesses and can hardly be construed as uniquely posi-

> To the extent that the holding in *Food Lion, Inc.* . . . can be read to sanction an independent action . . . we conclude that the federal district court incorrectly interpreted our state case law . . . . [A]n examination of our state's case law fails to reveal support for the . . . contention that this Court would broaden the scope of fiduciary duty to include food-counter clerks employed by a grocery store chain.[41]

Rather than obliquely relying on facts that show any employee being charged with fiduciary duties is in actuality an officer of the employer or implicitly establishing a presumption against the fiduciary status of lower-level employees, a much more direct approach would be advisable. Direct development of the law in this manner would not only provide clarity and a more rational analytical approach, but it would also provide better guidance to employers, employees, and those providing advice to them concerning the fiduciary obligations of all levels of employees.

This direct approach is apparent in Wisconsin common law. The Supreme Court of Wisconsin established an initial threshold to be met when the claim is for an employee's breach of the duty of loyalty.[42] The threshold question is whether the employee has an agency relationship;[43] if the employee is a "key employee" then the duty of loyalty is present.[44] The determination of whether one is a key employee depends on the nature of the employment duties.[45] In this particular case, the court looked to the fact that the employee was the "Procure-

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tioning him to exercise dominion." *Id. Accord* Reichhold Chemicals, Inc. v. Goel, 555 S.E.2d 281 (N.C. App. 2001).

[41] *Dalton*, 548 S.E.2d at 709. The federal district court held a cause of action for breach of fiduciary duty had been stated against supermarket employers who were actually television reporters who did not disclose their true identities in securing employment and later disclosed food mishandling via videotaping in the workplace. Food Lion, Inc. v. Capital Cities/ABC, Inc., 951 F. Supp. 1224 (M.D.N.C. 1996).

[42] Burbank Grease Servs., L.L.C. v. Sokolowski, 717 N.W.2d 781 (Wis. 2006).

[43] Burg v. Miniature Precision Components, Inc., 330 N.W.2d 192 (Wis. 1983).

[44] Burbank, 717 N.W.2d at 303–04 (citing Burg v. Minature Precision Components, Inc. 330 N.W.2d 192 (Wis. 1983); Aon Risk Servs., Inc. v. Liebenstein, 710 N.W.2d 175 (2006)). *See also* Marshfield Machine Corp. v. Martin, 630 N.W.2d 275 (Wis. Ct. App. 2001); Modern Materials, Inc. v. Advanced Tooling Specialists, Inc., 557 N.W.2d 835, 838 (Wis. Ct. App. 1996).

[45] *Burbank*, 717 N.W.2d at 796 (citing *Aon*, 710 N.W.2d at 175).

ment/Territory manager" and stood in a confidential relationship regarding trade secrets and other confidential data provided to him in this particular management position.[46] The details of the employee's responsibilities gave rise to the fiduciary duties of an agent and created the duty of loyalty and the duty not to disclose information material to the agency relationship.[47] Canadian employment law recognizes that while all employees owe a basic contractual duty of loyalty to their employers, only certain employees, based upon their duties and responsibilities, owe the more exacting fiduciary duties to employers.[48]

Only a few states statutorily define the agency relationship, one of which is the State of Georgia.[49] Georgia statutes define the agency relationship as arising "wherever one person, expressly or by implication, authorizes another to act for him or subsequently ratifies the acts of another in his behalf."[50] In addition, Georgia courts have held that an employer-employee relationship does not typically create an agency relationship unless the employee is vested with authority to act on behalf of the employer.[51] Fiduciary obligations such as a duty of loyalty do not extend to low level employees in Georgia.[52]

The scope of the duty of loyalty an employee owes to an employer in New Jersey varies with the nature of their relationship. [53] Employees performing low-level tasks owe a lesser duty than those occupying a position of trust and confidence.[54] In

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[46] *Id.* at 797.

[47] *Id.* at 797–98.

[48] James C. Oakley, *Employee Duty of Loyalty -- A Canadian Perspective*, 20 COMP. LAB. L. & POL'Y J. 185, 190 (1999).

[49] ALA. CODE § 8-2-1 (2008); CAL. CIV. CODE § 2307 (West 2009); GA. CODE ANN. § 10-6-1 (2008); MONT. CODE ANN. § 28-10-201 (2008); N.D. CENT. CODE § 3-01-06 (2008); S.D. CODIFIED LAWS § 59-2-2 (2008).

[50] GA. CODE ANN. § 10-6-1 (2008).

[51] *See* Atlanta Mkt. Ctr. Mgmt. Co. v. McLane, 503 S.E.2d 278 (Ga. 1998); *see also* Physician Specialists in Anesthesia, P.C. v. Wildmon, 521 S.E.2d 358, 360 (Ga. Ct. App. 1999).

[52] *See* Se. Consultants, Inc. v. McCrary Eng'g Corp., 273 S.E.2d 112 (Ga. 1980). *See Physician Specialists in Anesthesia*, 521 S.E.2d at 360–61 (noting that an employee does not have fiduciary duties when the agency relationship simply involves an employee who has no authority to create obligations on behalf of the employer and no right or access to confidential and corporate records).

[53] Cameco, Inc. v. Gedicke, 724 A.2d 783, 789 (N.J. 1999).

[54] *Id.* The court cogently explained:

Cameco, Inc. v. Gedicke,[55] a salaried employee, while still employed, established a business to supplement his income without disclosing this to his employer.[56] The court found the employee's fiduciary duty may have been breached even though the supplemental business did not directly compete with the employer's business simply because the new business may have assisted the employer's competitors.[57] The court remanded for a finding as to whether the specific conduct did amount to a breach of duty of loyalty.[58] The court did advise that the "egregiousness of the employee's conduct may affect the determination of" whether a breach had occurred and indicated the facts surrounding the employment itself also shaped the outcome:[59]

> Facts suggesting that [the employee] did not breach his duty of loyalty are that he was a low- or mid-level salaried employee; that during his employment, [he] was not subject to any contractual limitation preventing him from establishing an outside business; that he did not cause [the employer] to lose any customers, sales, potential sales, or profits; and that he did not compete directly with [the employer] or render substantial assistance to any of its competitors.[60]

> A reality of contemporary life is that many families will consist of two wage earners, one wage earner with two jobs, or both. For some employees, particularly those earning low or modest incomes, second sources of income are an economic necessity. For them, a second job or "moonlighting" is the only way to make ends meet. Conversely, employers need the assurance that employees will not disserve them by furthering their own interests or those of competitors at the employers' expense.

Id.

[55] *Id.*

[56] *Id.* at 786-87.

[57] *Id.* at 788. The trial court, however, had dismissed the employer's complaint and found the employer's testimony was "exaggerated" and vindictive, and concluded that the employee's actions were not detrimental to the employer, the employee's new business did not compete directly with the employer, and the employer had not suffered any damages. *Id.* at 787.

[58] *Id.* at 792.

[59] *Id.* at 789.

[60] *Id.* at 792. The court further opined that the fact finder could also determine that the employee's assistance to any competitor was so insubstantial or that any competition between the alleged competitors and the employer was so insubstantial that the employer did not breach any duty. *Id.*

A somewhat similar approach to the threshold has developed in other jurisdictions. The Tenth Circuit Court of Appeals interpreted Texas law to mean that agency relationships, and the fiduciary duties that attach, are not automatically assumed merely based on an employee-employer relationship.[61] Instead, the court looked at the particular facts of the employment circumstances and used them in analyzing whether an agency relationship had been created.[62] While courts frequently state an employee owes his or her employer a fiduciary duty, some courts will not recognize an independent claim for a breach of a duty of loyalty unless there is an underlying fiduciary relationship beyond a mere employment situation.[63] When the employee in *Rash v. J.V. Intermediate, Ltd.*[64] sued his former employer for fraud and breach of contract, the former employer counterclaimed alleging breach of employment contract, breach of fiduciary duty, and breach of the duty of loyalty.[65] The trial court granted the employee's motion for a judgment as a matter of law on the counterclaim for breach of fiduciary duty because no special relationship of trust and confidence existed between the employee and the employer.[66] The issues of breach of contract and breach of the duty of loyalty did go to the jury with the jury finding for the employee as to breach of contract, but granting the former employer's counterclaim damages due to the employee's breach of the duty of loyalty.[67] The appellate court, however, found that the trial court had erred because the facts

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[61] Rash v. J.V. Intermediate, Ltd., 498 F.3d 1201 (10th Cir. 2007).

[62] *Id.* at 1207–09.

[63] *Compare* Graphic Directions, Inc. v. Bush, 862 P.2d 1020 (Colo. Ct. App. 1993) (stating that fiduciary duties extend to more than corporate officers and high level employees) *and* Cenla Physical Therapy & Rehab. Agency, Inc. v. Lavergne, 657 So.2d 175, 176-77 (La. Ct. App. 1995) (noting that even "minor-role-playing employees" owe fiduciary duties to employers) *with* Beverly Hills Concepts, Inc. v. Schatz & Shatz, 717 A.2d 724, 729 (Conn. 1998) *and* Eaton Corp. v. Giere, 971 F.2d 136, 141 (8th Cir. 1992) (stating that a cause of action for breach of the duty of loyalty is encompassed in a claim for a breach of fiduciary duty).

[64] 498 F.3d 1201 (10th Cir. 2007).

[65] *Id.* at 1205-06.

[66] *Id.* at 1208.

[67] *Id.* At trial, the employee had requested $564,993 in damages and the jury awarded him $444,933 while the former employer requested $143,000 on its counterclaim for breach of duty of loyalty and the jury awarded $71,500 on the counterclaim. *Id.* at 1206.

of this employment not only gave rise to an agency relationship but also that the undisputed evidence showed the employee had breached the fiduciary duty.[68] In applying Texas law, the court recognized that employees are not necessarily agents with accompanying fiduciary duties and opined that fiduciary duties, while imposed on some business relationships because of "special trust,"[69] are not part of "every relationship involving a high degree of trust and confidence."[70] In determining as a matter of law that a fiduciary relationship, and therefore fiduciary duties, did indeed exist in this case, the court examined the employee's specific duties.[71] The employee had the ability to negotiate contracts with authority over subcontracts and he had a written employment contract in which he not only agreed to perform the duties of an agent, but also consented to devote "full work time and efforts to the business and affairs" of his employer.[72] Since these duties rose to the level of a "special trust," the court held that the employee had breached his fiduciary duty by failing to

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[68] *Id.* The Tenth Circuit Court of Appeals remanded for a jury determination of the damages on the breach of fiduciary duty claim and for a judicial determination of the remedy of forfeiture. *Id.* at 1215–16.

[69] *Id.* at 1207 (citing Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 200 (Tex. 2002)).

[70] *Id.* at 1207 (citing Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 176–77 (Tex. 1997)). Texas courts consider it "impossible to give a definition of the term" fiduciary duties in a way "comprehensive enough to cover all cases." *Johnson*, 73. S.W.3d at 199.

[71] *Rash*, 498 F.3d at 1208. The court pointed to three other cases where Texas courts have found employees to be agents and fiduciaries. *Id.* (citing *Johnson*, 73 S.W.3d at 202–03 (holding that a law firm's associate had a fiduciary duty when the associate "specifically undertook to act as [an] agent in obtaining an agreement" to represent helicopter crash victims); Kinzbach Tool Co., v. Corbett-Wallace Corp., 160 S.W.2d 509, 513 (Tex. 1942) (holding that a fiduciary duty existed where an employee "permitted his employer to consummate a contract where[] it bought for $25,000 that which he . . . knew might be bought for $20,000," failed to disclose this fact to his employer, and did not disclose "that he was acting for the opposite side in the deal for a profit to himself"); Daniel v. Falcon Interest Realty Corp., 190 S.W.3d 177, 185–87 (Tex. App. 2005) (holding that a fiduciary duty existed when the employee was "hired to serve as a project manager and on-site superintendent for the project" whose specific responsibilities included "soliciting bids, setting the scope of work for each subcontractor, reviewing the bids, letting the contracts, and overseeing people working on the project")).

[72] *Rash*, 498 F.3d at 1208–09. The employee had sole management responsibilities of a branch; he was charged with finding facilities to operate the business, hiring and training employees, gathering tools and equipment, promoting the venture, soliciting and receiving bids, and their invoices, setting customer rates, and tracking all costs. *Id.* at 1208.

disclose his interest in another company that competed and contracted with the employer.[73]

The court in *Rash* carefully segregated an employee's "common law" duty of loyalty from an agent's fiduciary duty and stated:

> [T]he fiduciary relationship establishes a distinct and separate obligation than the duty of loyalty to an employer described above. The fiduciary duty exists because of the "peculiar" trust between the employee-agent and his employer-principal. . . . Thus, the bonds created by a fiduciary relationship are stronger and the obligations are correspondingly more rigorous than those ascribed to the duty of loyalty.[74]

Not only did the court distinguish between the duty of loyalty, which every employee owes to her employer, and the fiduciary duty owed by an agent, but the court also stated that an agent's fiduciary duty may be "more wide-ranging" and the employee's actions could constitute a "more egregious violation under a fiduciary theory than under a loyalty theory."[75]

It is when we look to the damages to be applied to a particular case that these distinctions become critical. For a breach of the duty of loyalty, typically an employer has the option of recovering either the profit earned by the disloyal employee or the profit the employer would have earned had the employee not been disloyal.[76] The remedy of disgorgement[77] is not only to compensate for the wrong but to act as a disincentive to prevent such wrongs from occurring.[78] The concepts of restitution and

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[73] *Id.* at 1209–11.

[74] *Id.* at 1211.

[75] *Id.* Since the employer had argued the breach of fiduciary duty claim was an alternative, not a supplement, to the duty of loyalty claim, the court held that a jury determination on the damages for breach of fiduciary duty would have to be offset by the previously awarded amount on the breach of duty of loyalty claim. *Id.* at 1212.

[76] *See* Gomez v. Bicknell, 756 N.Y.S.2d 209, 214 (2002).

[77] *See generally* Daniel v. Falcon Interest Realty Corp., 190 S.W.3d 177, 186-87 (Tex. Ct. App. 2005).

[78] *Gomez*, 756 N.Y.S.2d at 113-14 (citing Diamond v. Oreamuno, 248 N.E.2d 910, 912 (N.Y. 1969)). *See* Millbank, Tweed, Hadley & McCloy v. Boon, 13 F.3d 537, 543 (2d Cir. 1994) (stating that a principal could recover for breach of fiduciary duty without proving "but for" causation or proximate cause).

unjust enrichment[79] also support the legal basis for liability[80] even though the employer is not able to establish that the employee's breach of the duty of loyalty caused a loss to the employer.[81] Some courts, however, require a strict causal connection between the breach of fiduciary duty and the amount of damages claimed.[82]

When a strict causal connection is required, or when a disloyal employee has not realized any gain, or when it is difficult to prove that any harm to a principal resulted from such disloyalty, forfeiture may be the remedy utilized by a court.[83] Forfeiture not only has a valuable deterrent effect because it signals that some adverse consequences will inure to any disloyal employee,[84] but it also enables the employer to have a remedy at a much lower cost than protracted litigation:[85]

> Forfeiture is based on two propositions: (1) the principal is considered not to have received what he bargained for if the agent breaches his fiduciary duties while representing the principal, and (2) fee forfeiture is designed to discourage agents from being disloyal to their principal or "to protect relationships of trust by discouraging agents' disloyalty." The re-

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[79] *See generally* VRG Corp. v. GKN Realty Corp., 641 A.2d 519, 526 (N.J. 1994) (defining the concepts of restitution and unjust enrichment).

[80] "[A] plaintiff suing for breach of fiduciary duty can recover damages for mental anguish" in some jurisdictions. Justice Terry Jennings, *Fiduciary Litigation in Texas*, 69 TEX. B.J. 844, 848 (2006) (citing Perez v. Kirk & Carrigan, 822 S.W.2d 261, 266-67 (Tex. App. 1991)).

[81] RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. d(1) (2006).

[82] Augat, Inc. v. Aegis, Inc., 631 N.E.2d. 995, 999 (Mass. 1994).

[83] Katalinic v. Bd. of Trustees of Mun. Employees', Officers', & Officials' Annuity & Benefit Fund, 898 N.E.2d 243, 248 (Ill. App. 1st 2008) (stating that forfeiture is sufficient so long as there is a causal connection with the employment); Musico v. Champion Credit Corp., 764 F.2d 102, 113 (2d Cir. 1985) (noting the trend in New York law is toward the Restatement position of apportioning forfeitures of a disloyal agent's compensation in specified circumstances).

[84] RESTATEMENT (THIRD) OF AGENCY (THIRD) § 8.01 cmt. d(2) (2006).

[85] *Id.* Employers can also pursue appropriate remedies against employees for misappropriation of trade secrets, but proving such has been so difficult, expensive and unpredictable that employers have found it prohibitive to use except in extreme cases. Yuval Feldman, *Experimental Approach to the Study of Normative Failures: Divulging of Trade Secrets by Silicon Valley Employees*, 2003 U. ILL. J.L. TECH. & POL'Y. 105, 117–18 (2003).

medy of forfeiture "applies generally in agency relationships."[86]

The facts of the employment relationship and the extent of the employee's actions should affect the applicability and the extent of any forfeiture.[87] Forfeiture is generally an equitable remedy, comparable to a constructive trust.[88] Generally, a former employee may be required to repay all compensation[89] received during the period of her disloyalty.[90] Some states do not permit set-off for properly performed services during the period of disloyalty,[91] while others limit forfeiture or apportion fees

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[86] Rash v. J. V. Intermediate, Ltd., 498 F.3d 1201, 1212 (10th Cir. 2007) (quoting Burrow v. Acre, 997 S.W.2d 229, 237-38, 242-43 (Tex. 1999)) (citations omitted).

[87] Futch v. McAllister Towing of Georgetown, Inc., 518 S.E.2d 591, 596–97 (S.C. 1999) (stating that in assessing compensation in forfeiture, "the nature of the employment relationship, the nature and extent of the employee's services and the breach of duty, the loss or expense caused to the employer by the breach of duty, and the value to the employer of the services properly rendered by the employee" should be taken into consideration). *See also* Hartford Elevator, Inc. v. Lauer, 289 N.W.2d 280, 287 (Wis. 1980) (stating that the court must focus on the particular circumstances of a case rather than adopting a rigid rule requiring forfeiture of all compensation during disloyalty); Jet Courier Serv. v. Mulei, 771 P.2d 486, 497 (Colo. 1989) (stating that the court should consider the nature of the employment relationship, the impact or potential impact of the employee's actions on the employer's operations, and the benefit received by the employer during the period of disloyalty).

[88] Justice Terry Jennings, *Fiduciary Litigation in Texas*, 69 TEX. B.J. 844, 848 (2006) (citing Burrow v. Arce, 997 S.W.2d 229, 238 (Tex. 1999)).

[89] *See* Foley v. Am. Elec. Power, 425 F. Supp. 2d 863, 875-76 (S.D. Ohio 2006) (deferring that compensation plan benefits constitute forfeitable employee compensation); Phansaalkar v. Anderson Weinroth & Co., L.P., 344 F.3d 184, 210-11 (2d Cir. 2003) (stating that employer offered investment opportunity and its realized benefits are subject to forfeiture by a disloyal employee).

[90] G.K. Alan Assoc., Inc. v. Lazazari, 840 N.Y.S.2d 378, 384-85 (App. Div. 2007) (noting that federal courts typically hold forfeiture to only compensation due in relation to the disloyal action or actions); Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker, 865 N.Y.S.2d 14, 23–24 (App. Div. 2008) (stating that in terms of attorney disloyalty in the attorney-client relationship, a separate hearing is required to fully establish disloyalty for forfeiture purposes); Aramony v. United Way Replacement Benefit Plan, 191 F.3d 140, 153 (2d Cir. 1999) (noting that under New York law employees are obliged to forfeit salary during the period of disloyalty).

[91] Jet Courier Serv., Inc. v. Mulei, 771 P.2d 486, 505 (Colo. 1989) (Mullarkey, J., concurring) ("Set-offs against wage claims are disfavored because of the inherent economic inequity between the employer and employee."); ABC Trans Nat'l Transp., Inc. v. Aeronautics Forwarders, Inc., 413 N.E.2d 1299, 1315 (Ill. App. 1980) (stating that while forfeiture is proper during periods of disloyalty, "[t]he agent retains compensation rightfully earned before the breach, for specific periods").

under certain conditions.[92] Complete forfeiture is imposed in Massachusetts unless the disloyal conduct is not egregious and the employee has established that his services were valuable beyond the parameters of his disloyal conduct,[93] yet little attention actually has been paid to the egregiousness factor by the courts.[94] Instead, the baseline proposition has remained one of complete forfeiture by a disloyal employee.[95] The approach to forfeiture in New Jersey, however, is somewhat different.[96] The court in *Cameco, Inc. v. Gedicke* outlined four considerations that would affect whether forfeiture was an appropriate remedy for breach of an employee's duty.[97] First, the court looked at the existence of contractual provisions, and whether such provisions permitted or specifically prohibited certain behavior.[98] Second, the court determined whether the employer knew of or agreed to the employee's conduct, with the court allotting specific interest to any employee disclosures to the employer.[99] Third, the court examined the status of the employee and her relationship to the employer.[100] Finally, the court looked at the nature of the employee's second source of income.[101] The usefulness of these four considerations is somewhat undercut by the court's recognition that the guidelines require reference to specific facts, which, due

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[92] Sequa Corp. v. GBJ Corp., 156 F.3d 136, 148-49 (2d Cir. 1998) (applying a rule of apportionment under New York law to the fees related to the specific items of work for which the agent had acted disloyally); Bessman v. Bessman, 520 P.2d 1210, 1219 (Kan. 1974) (stating that a minor breach affecting a single transaction will not result in forfeiture of the compensation attributable to other transactions).

[93] Tory A. Weigand, *Employee Duty of Loyalty and the Doctrine of Forfeiture*, 42 BOSTON B.J., Sept.-Oct. 1998, at 6, 7.

[94] *Id.* at 21-22 (citing Boston Children's Heart Found., Inc. v. Nadal-Ginard, 73 F.3d 429, 435 (1st Cir. 1996)).

[95] *Id.*

[96] *See, e.g.*, Simulations Sys. Tech., Inc. v. Oldham, 634 A.2d 1034 (N.J. App. 1993); Joseph Toker, Inc. v. Cohen, 169 A.2d 838 (N.J. App. 1961).

[97] Cameco, Inc. v. Gedicke, 724 A.2d 783, 791 (N.J. 1999). The court looked to whether the employee's conduct was "willful and deliberate" as well as the "egregiousness" of the actions. *Id.*

[98] *Id.*

[99] *Id*

[100] *Id.* This third consideration would appear to mirror the analysis concerning whether a fiduciary relationship even existed to justify the application of any doctrine of forfeiture. "An officer, director, or key executive, for example, has a higher duty than an employee working on a production line." *Id.*

[101] *Id.* at 791.

to an inadequate record, were lacking in this particular case.[102] While the court in *Rash v. J.V. Intermediate, Ltd.* did not list similar considerations for the applicability of the remedy of forfeiture, it did state that forfeiture was a proper equitable remedy that applied only to *clear and serious* violations of fiduciary duties and thus remanded for a judicial determination of the propriety of the remedy of forfeiture.[103] Before this judicial determination could be made, the court, upon remand, submitted fact questions to the jury concerning the timing of the employee's breach of fiduciary duty, the willfulness of the employee's acts, and the damages caused thereby.[104] Because of this, it appears as though the court believes these facts will determine if the violations were clear and serious.

A disjunction would seem to occur between the agency concept making the employment relationship one of agency and the fiduciary duties and the remedies for breach of those duties as applied to lower-level employees. At best, applying the lens of agency law to all employment situations requires most jurisdictions to engage in an overlapping analysis in first trying to decide if the specific facts give rise to a breach of fiduciary duty by an employee, and then again when adjudicating the appropriate remedy. An officer or an employee who possesses significant discretion and authority in her position should have higher duties of loyalty imposed by law than those of the lower-level employee. The law of agency would appear to be best situated to properly define these distinctions. While the concept of a broad duty of loyalty owed to every employer is an enticing one, if an employer is uniquely vulnerable to an employee who holds discretion or authority, the employer has it within its power to take

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[102] *Id.* at 792. John A. Boyle, *Moonlighting–Employee Assistance to an Employer's Competitor, Including Formation of a Competing Business, May Breach the Employee's Duty of Loyalty and Require Forfeiture of Compensation Paid to the Employee During Periods of Disloyalty*, 30 SETON HALL L. REV. 673, 681 (2000).

[103] Rash v. J. V. Intermediate, Ltd., 498 F.3d 1201, 1212, 1216 (10th Cir. 2003). Upon remand, the jury's involvement in the equitable remedy of forfeiture is limited to resolving contested fact issues. *See* Rash v. J.V. Intermediate, Ltd., No. 04-CV-681-FHM, 2008 WL 2568305, at *1 (N.D. Okla. June 20, 2008).

[104] *Rash*, 498 F.3d at 1212, 1216.

additional measures for adequate protection.[105] The lower-level employee, however, has no such ability to insulate himself from the overbroad application of fiduciary duties. The sweeping categorization of every employee as an agent without permitting distinctions for those employees who are not "key"[106] or who do not hold a position of "special trust"[107] creates the very real possibility that low-level employees may suffer from the harsh forfeiture remedies without any allowance made for work performed during a period outside of the perceived breach. While total forfeiture may make sense as a punitive or deterrent measure in the case of an officer or confidential employee, it unfairly tips the scale in favor of the employer when it over broadly includes all employees. The concept of employee fiduciary duties should be more carefully defined and not just applied to all.

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[105] Employers should seek protections as part of an employment contract, confidentiality agreement, trade secrets, and the like. Both employer and employee would be on notice as to the terms and have an opportunity for a bargained for exchange.

[106] Burbank Grease Serv., LLC v. Sokolowski, 717 N.W.2d. 781, 796 (Wis. 2006).

[107] *Rash*, 498 F.3d at 1207.