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MODIFYING AT-WILL EMPLOYMENT CONTRACTS

RACHEL ARNOW-RICHMAN*

Abstract: This Article addresses the problem of “mid-term” modification of employment—the common employer practice of introducing adverse changes in incumbent employees’ terms of employment on penalty of termination. It calls for a universal reasonable notice rule under which courts would enforce mid-term modifications only where the worker received reasonable advance notice of the change. An employer’s sudden imposition of new terms prevents employees from exercising what is often their only form of bargaining power—the ability to credibly threaten departure. Rejecting retrograde judicial approaches that turn on the presence or absence of consideration, the Article argues for a “procedural good faith” rule that directly polices the risk of coercion consistent with contemporary contract modification law. Courts should enforce mid-term modifications only where the employer provides enough advance notice to allow the employee time not only to meaningfully consider the proposed change, but also to compare and secure alternate work.

*[E]very social structure . . . has a fundamental problem with conflicting needs for certainty and for flexibility.*¹

—Ian R. Macneil

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¹ Ian R. Macneil, *Bureaucracy, Liberalism and Community—American Style*, 79 NW. U. L. REV. 900, 911 (1984).

INTRODUCTION

Long-term employment relationships are constantly in flux. Worker responsibilities, terms of compensation, job titles, company policies, employer-provided benefits, and a variety of other conditions of work are routinely altered over the course of what is often a multi-year, highly dynamic professional and personal relationship. In cases involving at-will employment—the vast majority of such relationships—the economic realities and power dynamics are such that changes in terms are likely to be introduced unilaterally by the employer for purposes of advancing its own business interests.² The worker is often presented with a set of non-negotiable terms, less favorable than the ones ostensibly governing the parties, and asked to accept on the implicit or explicit threat of termination.³

The contractual enforceability of these “mid-term modifications,”⁴ as this Article refers to them, has significant ramifications for the economic

² The author has described this problem previously in the context of employer-imposed arbitration and noncompete agreements, both of which require the employee to give up critical background rights to the advantage of the employer. See generally Rachel Arnow-Richman, *Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements*, 49 ARIZ. L. REV. 637 (2007) [hereinafter Arnow-Richman, *Cubewrap Contracts*] (arguing against court enforcement of delayed term, or “cubewrap,” employment contracts). This Article considers the enforcement of these documents under somewhat different circumstances and in relation to judicial treatment of other types of employer-initiated changes in terms, most notably the unilateral modification of employee handbooks and personnel policies. See *infra* notes 42–133 and accompanying text.

³ To be sure, not all changes in terms will be adverse to the employee. In the context of employee handbooks, for instance, an employer may choose to augment or enhance existing benefits and compensation policies in the interest of maintaining employee morale, improving retention, and positioning itself as an employer of choice in the market for quality employees. See, e.g., *Woolley v. Hoffman-La Roche, Inc.*, 491 A.2d 1257, 1263–64 (N.J.) (noting in a dispute over contractual enforceability of a handbook termination policy that past modifications of the handbook had almost always favored employees), *modified*, 499 A.2d 515 (N.J. 1985). In such contexts, however, one can assume that the employee is amenable to the change. This Article focuses on adverse changes where the quality of employee assent is likely to be in question.

⁴ In adopting this term, this Article means to distinguish between true modifications—situations in which employers genuinely decide to adopt new terms and policies during the course of an ongoing relationship—and the human resources practice of providing “new” terms upon the commencement of work that were not revealed at the time the offer of employment was extended and accepted. Elsewhere this author has described the latter type of agreement as a “cubewrap” contract and argued that such agreements should be categorically unenforceable in situations where the employer could have provided the terms in advance. See generally Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963 [hereinafter Arnow-Richman, *Worker Mobility*] (arguing courts should not enforce “cubewrap” noncompete agreements provided upon or shortly after commencement of employment); Arnow-Richman, *Cubewrap Contracts*, *supra* note 2 (defining and arguing against the enforcement of cubewrap noncompete and arbitration agreements). In the literature of restrictive covenants, a noncompete signed subsequent to the start of employment has also been referred to as an “afterthought” agreement. See Jordan Leibman & Richard Nathan, *The Enforceability of Post-Employment Noncompetition Agreements Formed*

success of corporate actors and the livelihood and wellbeing of individual workers. Employees want to be able to rely on consistent compensation and benefits. Employers genuinely require flexibility to deal with changes in personnel matters and external economic circumstances. Despite this, the common law has developed neither a coherent legal framework for analyzing mid-term modifications, nor a theoretical basis for understanding existing doctrine.

Judicial treatment of mid-term modification controversies reveals two broad categories of approaches. Under what this Article calls the “unilateral modification” approach,⁵ courts typically permit employers to change terms at their discretion.⁶ These courts theorize that because at-will employment may be terminated at any time, continued employment constitutes consideration for any changed terms the employer might chose to impose.⁷ In contrast, some courts follow what this Article calls the “formal modification” approach.⁸ These courts require the employer to provide an additional benefit beyond continued employment—such as a raise, bonus, or other employ-

After At-Will Employment Has Commenced: The “Afterthought” Agreement, 60 S. CAL. L. REV. 1465, 1523–28 (1987). The use of that term, however, does not distinguish between terms that genuinely arise during the course of employment and those that could have been provided in advance of hire. This Article considers only the former.

⁵ See Rachel Arnow-Richman, *Employment Law Inside Out: Using the Problem Method to Teach Workplace Law*, 58 ST. LOUIS U. L.J. 29, 44–46 (2013) [hereinafter Arnow-Richman, *Inside Out*] (adopting this terminology).

⁶ See, e.g., *Asmus v. Pacific Bell*, 999 P.2d 71, 78–79 (Cal. 2000) (holding that notice plus offer of continued employment constituted consideration for modification of job security policy six years after its promulgation); *Lucht’s Concrete Pumping, Inc. v. Horner*, 255 P.3d 1058, 1063 & n.3 (Colo. 2011) (en banc) (holding continued employment to be sufficient consideration for a noncompete signed two years after the start of employment); *Melena v. Anheuser-Busch, Inc.*, 847 N.E.2d 99, 109 (Ill. 2006) (holding continued employment to be sufficient consideration for an arbitration program added one year after the start of employment); *infra* notes 42–133 and accompanying text.

⁷ See, e.g., *Asmus*, 999 P.2d at 78; *Lucht’s*, 255 P.3d at 1063; *Melena*, 847 N.E.2d at 109; *infra* notes 42–133 and accompanying text. There are a number of important variations on this approach that this Article distinguishes *infra* notes 42–133 and accompanying text. In the noncompete context, for instance, a handful of courts require that the employer actually retain the employee for an unspecified amount of time, as opposed to offering a mere promise of continued employment. See, e.g., *McRand, Inc. v. Van Beelen*, 486 N.E.2d 1306, 1313 (Ill. App. Ct. 1985) (“We also hold that continued employment for a substantial period is sufficient consideration to support the employment agreement.”). More importantly, in the context of handbook modification, some courts have required the employer to provide reasonable notice of the unilateral modification. See, e.g., *Asmus*, 999 P.2d at 78 (Cal. 2000) (“The general rule governing the proper termination of unilateral contracts is that once the promisor determines after a reasonable time that it will terminate or modify the contract, and provides employees with reasonable notice of the change, additional consideration is not required.”); *infra* notes 104–133 and accompanying text. This Article argues that the latter approach should be adopt as the universal rule for determining the enforceability of mid-term modifications, at least in those situations in which the relationship remains at will. See *infra* notes 215–295 and accompanying text.

⁸ See Arnow-Richman, *Inside Out*, *supra* note 5, at 47.

er promise—in recognition of the fact that the employer remains free to terminate the employee at will subsequent to the changed terms.⁹ Under this view, the mere promise of continued at-will employment is illusory and cannot supply the requisite consideration for a change in contract terms.¹⁰

This Article problematizes the assumptions underlying both approaches. First, it argues that the unilateral and formal modification approaches give undue attention to consideration in determining the enforceability of contractual modifications. Contemporary modification doctrine has systematically moved away from the historical inquiry into consideration in favor of an approach grounded in fairness and voluntariness.¹¹ Courts' use of consideration as the touchstone for enforcement reflects a retrograde understanding of modification law that aims to satisfy formalistic rules of contract formation at the expense of assessing the legitimacy of the employee's assent to modification. In reality, at-will employees have no "choice" in consenting to mid-term modifications, irrespective of whether they receive "new" or "separate" consideration in supposed exchange for the new terms.

Second, the Article argues that neither the unilateral nor formal modification approach properly balances the competing policy goals that animate contemporary modification law. The historical rationale for a strict new consideration requirement in determining the enforceability of a modifica-

⁹ See, e.g., *Demasse v. ITT Corp.*, 984 P.2d 1138, 1145 (Ariz. 1999) (en banc) (holding that to modify a handbook "[s]eparate consideration, beyond continued employment, is necessary"); *J.M. Davidson, Inc., v. Webster*, 128 S.W.3d 223, 228 (Tex. 2003) (holding, in context of arbitration agreement signed by incumbent employee, "[a]t-will employment does not preclude formation of other contracts between employer and employee, so long as neither party relies on continued employment as consideration for the contract"); *Labriola v. Pollard Grp., Inc.*, 100 P.3d 791, 796 (Wash. 2004) (holding that "independent consideration is required at the time promises are made for a noncompete agreement when employment has already commenced"); *infra* notes 42–133 and accompanying text.

¹⁰ In the particular situation of changes to prior policies that allegedly altered the employee's at-will status, courts have put forth a different but related analysis, namely, that because the employer has lost its right to freely to terminate the relationship, its continuation of the employee's employment cannot serve as consideration for new terms. See, e.g., *Demasse*, 984 P.2d at 1145 ("[C]ontinued employment alone is not sufficient consideration to support a modification to an implied-in-fact contract. Any other result brings us to an absurdity: the employer's threat to breach its promise of job security provides consideration for its rescission of that promise." (emphasis omitted)). As discussed *infra* notes 148–159 and accompanying text, this is essentially an application of the traditional common law pre-existing legal duty rule.

¹¹ The culmination of this trend is the Uniform Commercial Code's ("UCC") adoption of a good faith modification rule, which explicitly rejects the common law's pre-existing legal duty rule and the requirement of "new" consideration to support a modification. See U.C.C. § 2-209(1) (AM. LAW INST. & NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAW 2015) ("An agreement modifying a contract within this Article needs no consideration to be binding."); *id.* § 2-209 cmt. 2 ("[M]odifications made [under subsection (1)] must meet the test of good faith imposed by this Act."); *infra* notes 178–212 and accompanying text.

tion was to protect against possible coercion.¹² The flip side of that concern is the need for flexibility, particularly in long-term relationships where market circumstances and the needs of the parties will likely change over time.¹³ Commercial law's rejection of the consideration rule reflected a desire to better balance these goals, requiring a good faith showing of the need for the modification and making the inquiry into coercion direct and explicit.¹⁴ Mid-term modification law, however, with its continued focus on consideration, prioritizes flexibility. Under the unilateral modification rule, employers have free reign to change terms of employment at any time, regardless of their content or the quality of employee assent, whereas under the formal modification rule, employers need only implement their preferred terms contemporaneous with a modest pro-employee adjustment, which often is itself tied to continued employment.¹⁵

Instead, this Article advocates for a universal reasonable notice rule in assessing the enforceability of mid-term modifications.¹⁶ Drawing on case law developments in the handbook modification context,¹⁷ the Article proposes that mid-term modifications unilaterally imposed by employers in at-will relationships should be enforceable only where the employer provides reasonable advance notice of the change.¹⁸ Reasonable notice would mean

¹² See 2-7 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 7.1 (2015), LexisNexis (attributing the rule to “tough cases in which one contracting party has been subjected to a holdup game, so that the promisor [agreed to the modification] under some degree of economic duress”); *infra* notes 148–159 and accompanying text.

¹³ See Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 900–01 (1978).

¹⁴ See U.C.C. § 2-209(1); *infra* notes 178–212 and accompanying text.

¹⁵ Formal modification courts typically recite that additional consideration can take the form of a promised promotion, raise, or other benefit, disregarding the role of employment at will. See, e.g., *Labriola*, 100 P.3d at 794 (“Independent consideration may include increased wages, a promotion, a bonus, a fixed term of employment, or perhaps access to protected information.”); *Hopper v. All Pet Animal Clinic, Inc.*, 861 P.2d 531, 541 (Wyo. 1993) (“The separate consideration . . . would include promotion, pay raise, [or] special training . . .”). At one point, Texas law seemingly required that a valid consideration have value independent of continued employment. See *Light v. Centel Cellular Co. of Tex.*, 883 S.W.2d 642, 646–48 (Tex. 1994) (construing employer’s reciprocal promise to provide initial training as forming an immediately binding bilateral contract and distinguishing situations in which provision of training or confidential information was subject to continued employment); see also Richard A. Lord, *The At-Will Relationship in the 21st Century: A Consideration of Consideration*, 58 BAYLOR L. REV. 707, 739–42 (2006) (discussing the wisdom of Texas’ historical approach). The Texas Supreme Court, however, has since retreated from this approach. See *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 650–51 (Tex. 2006) (enforcing noncompete signed after the start of employment based on employer’s promise to provide confidential information over the course of employee’s continued at-will employment despite illusory nature of employer’s promise where such information was in fact provided resulting in a binding unilateral contract).

¹⁶ See *infra* notes 213–295 and accompanying text.

¹⁷ See, e.g., *Asmus*, 999 P.2d at 71; *infra* notes 104–133 and accompanying text.

¹⁸ See *infra* notes 215–295 and accompanying text.

an amount of time necessary for the employee to assess the significance of the change and consider alternatives, in particular the possibility of finding alternate employment.¹⁹ Such an approach is more consistent with mainstream contract doctrine, lends greater clarity and predictability to existing law, and better balances the competing policy goals of flexibility and fairness for both parties.

A few disclaimers are in order. First, there are reasons to question whether, as a matter of policy or supervening law, certain substantive terms of employment should be deemed unenforceable irrespective of when or how an employee agrees to them. For instance, commentators have long expressed concern that noncompetes may unfairly constrain workers' ability to earn a living,²⁰ and recent research has suggested that such agreements may suppress innovation and impede economic growth.²¹ This Article does not engage those questions, taking the majority rule enforcing reasonable noncompetes as a given.²² It does, however, recognize and endorse the various jurisdiction-specific limitations that constrain enforceability in particu-

¹⁹ In making these assertions this Article parts company with the recent *Restatement of Employment Law*, which ostensibly endorses a reasonable notice approach to handbook modifications. See RESTATEMENT OF EMP'T LAW § 2.06 (AM. LAW INST. 2015) ("An employer may prospectively modify or revoke its binding policy statements if it provides reasonable advance notice of, or reasonably makes accessible, the modified statement or revocation to the affected employees."). In contrast to the *Restatement*, this Article advocates for an expansive understanding of reasonable notice, sufficient to enable the employee to conceivably find replacement work. See, e.g., *Asmus*, 999 P.2d at 71 (upholding modification of employee handbook where plaintiff-employees had six months' advance notice of the disputed modification). In addition, this Article limits the rule to situations involving at-will employees, recognizing a distinction where the employee was previously promised long-term job security. The Article expands on these points in juxtaposition to the *Restatement's* position in greater detail *infra* notes 215–262 and accompanying text.

²⁰ See Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 652–53 (1960) (explaining that covenants not to compete have the effect of reducing a person's value in the competitive marketplace, and are neither efficient nor fair, because the cost to employees bears no relation to the risk of injury to employers and often overprotects employers).

²¹ See, e.g., ORLY LOBEL, *TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING* 34–35 (2013) (rejecting "orthodox" view that noncompetes are necessary to incent investments in workers and developing a "dynamic" model in which employee mobility creates positive externalities that inure to the benefit of all employers); Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 577–78 (1999) (suggesting that the growth of Silicon Valley may owe in part to the mobility of its workforce and consequent knowledge spillovers enabled by California's ban on employee noncompetes).

²² The key exception is California, which refuses to enforce employee noncompetition agreements. See CAL. BUS. & PROF. CODE §§ 16600–16602.5 (West 2008); see also HAW. REV. STAT. § 480-4(d) (LexisNexis 2015) ("[I]t shall be prohibited to include a noncompete clause or a nonsolicit clause in any employment contract relating to an employee of a technology business."); N.D. CENT. CODE § 9-08-06 (2006) (voiding employee noncompetition agreements).

lar circumstances.²³ The arguments advanced in this Article, precluding enforcement of mid-term modifications absent reasonable notice, would operate in addition to, not instead of, those rules.²⁴

Second, this Article accepts the regime of employment at will which permits either party to terminate the employment relationship for any or no reason and recognizes that many employees lack the ability to bargain for particular terms of employment.²⁵ It seeks neither to dismantle the dominant rule nor correct for employees' limited bargaining power.²⁶ Rather the Arti-

²³ Most jurisdictions require employers to demonstrate a "legitimate" or "protectable" interest in trade secrets, confidential information, or customer relations as a threshold to enforcement, and then limit enforcement to that which is reasonably necessary to safeguard the interest asserted. See generally RESTATEMENT (SECOND) OF CONTRACTS § 188 (AM. LAW INST. 1981) ("A promise to refrain from competition . . . is unreasonably in restraint of trade if (a) the restraint is greater than is needed to protect the promisee's legitimate interest, or (b) the promisee's need is outweighed by the hardship to the promisor and the likely injury to the public.").

²⁴ The same is true with respect to the various judicially-imposed limitations on the substantive terms of employee arbitration agreements grounded in the unconscionability doctrine. See, e.g., *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 693–94 (Cal. 2000) (finding unconscionable an arbitration agreement that limited recovery of a successful employee to back pay yet preserved the employer's right to file claims against employees in court); see also David Horton, *Unconscionability Wars*, 106 NW. U. L. REV. COLLOQUY 13, 19 (2011) (describing how unconscionability has become such a critical tool in invalidating arbitration agreements as to appear "less like a traditional contract defense and more like a specialized anti-arbitration measure"). Many of these limitations appear to survive the U.S. Supreme Court's 2011 decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011), which struck down the U.S. Court of Appeals for the Ninth Circuit's application of California's unconscionability rule precluding class action waivers in arbitration agreements as inconsistent with the Federal Arbitration Act. See generally Jerrett Yan, Note, *A Lunatic's Guide to Suing for \$30: Class Action Arbitration, the Federal Arbitration Act and Unconscionability After AT&T v. Concepcion*, 32 BERKELEY J. EMP. & LAB. L. 551 (2011) (concluding that courts have read *Concepcion* narrowly as precluding only a per se ban on class action waivers, leaving intact the fact-intensive unconscionability analysis that courts had applied to arbitration agreements generally).

²⁵ The employment at will rule has at times been articulated as permitting parties to terminate without notice, as well as without reason. The author contends in a prior Article that this formulation is incorrect and that employment at will does not defeat the general contract rule that parties to an agreement of indefinite duration must provide reasonable notice of termination. See Rachel Arnov-Richman, *Mainstreaming Employment Contract Law: The Common Law Case for Reasonable Notice of Termination*, 66 FLA. L. REV. 1513, 1582–83 (2014) [hereinafter Arnov-Richman, *Mainstreaming Employment Contract Law*]. The proposal advanced in this Article could rest on that same premise. That is, if employers must provide reasonable notice of termination, they must similarly provide reasonable notice of changes in terms. This Article, however, independently justifies the adoption of a reasonable notice approach to mid-term modifications so that neither a court nor the reader need accept the conclusions of the author's earlier work.

²⁶ A large body of scholarship has criticized employment at will from various ideological and methodological perspectives and argues in favor of a rule constraining employers' ability to terminate without cause. See generally Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967) (arguing for additional limits on an employer's right to discharge employees); Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does It Matter?*, 77 N.Y.U. L. REV. 6 (2002) (asserting that a default rule allowing discharge only for cause and requiring employees to waive their "right to for-cause protection" would bring the law in line with employees' expecta-

cle aims to leverage existing contract doctrine and its underlying justifications to enable employees to exercise the limited bargaining power they have. The result is not a level playing field, but one on which employees are better positioned to play according to (and perhaps despite) the governing rules.

This Article proceeds as follows. Part I describes the problem of mid-term modification of at-will employment terms and the incoherence in existing law.²⁷ It examines three recurring situations—the unilateral imposition of covenants-not-to-compete, arbitration agreements, and employee handbook modifications subsequent to the start of employment. Part II turns to the law of contract modification outside the employment context, exposing how principles of voluntariness and good faith have informed contemporary doctrine.²⁸ Part III explores how the principles underlying mainstream contract modification law might inform courts' treatment of mid-term modifications of employment at will, proposing a reasonable notice rule that would grant employees sufficient opportunity to consider proposed changes in terms and seek alternate employment.²⁹ Part IV considers possi-

tions); Jeffrey M. Hirsch, *The Law of Termination: Doing More with Less*, 68 MD. L. REV. 89 (2008) (pointing to patchwork nature of current laws and regulations relating to termination as justification for policy change); Arthur S. Leonard, *A New Common Law of Employment Termination*, 66 N.C. L. REV. 631 (1988) (arguing employers should have to present a plausible reason for termination); Ann C. McGinley, *Rethinking Civil Rights and Employment At Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443 (1996) (proposing federal wrongful discharge statute); Cornelius J. Peck, *Unjust Discharges From Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979) (arguing just-cause termination rule should replace at-will employment); Henry H. Perritt, Jr., *Wrongful Dismissal Legislation*, 35 UCLA L. REV. 65 (1987) (discussing policy arguments justifying increased restrictions on employers' ability to dismiss employees); Nicole B. Porter, *The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause*, 87 NEB. L. REV. 62 (2008) (proposing "compromise" statute between just-cause termination and at-will employment); Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56 (1988) (discussing debate over wrongful dismissal and employment at will); Clyde W. Summers, *Employment At Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65 (2000) (outlining history of at-will employment doctrine in American law); Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. REV. 106 (2002) (arguing for an information forcing just cause "default rule"). Elsewhere, the author engages this scholarship, concluding that employees would be better served by a statutory rule requiring advance notice or severance pay rather than just cause. See Rachel Arnow-Richman, *From Just Cause to Just Notice in Reforming Employment Termination Law*, in RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW 296, 324–25 (Cynthia L. Estlund & Michael L. Wachter eds., 2012) [hereinafter Arnow-Richman, *Just Cause to Just Notice*]; Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment At Will*, 58 UCLA L. REV. 1, 72 (2010). For purposes of this Article, however, the author accepts employment at will and its existing just-cause-based exceptions as the governing legal framework.

²⁷ See *infra* notes 34–139 and accompanying text.

²⁸ See *infra* notes 144–212 and accompanying text.

²⁹ See *infra* notes 215–295 and accompanying text.

ble obstacles to implementing a reasonable notice rule and the inherent limits of the approach.³⁰

I. CHANGED TERMS OF AT-WILL EMPLOYMENT

Mid-term modification is a recurring and pervasive problem that affects a variety of substantive employment terms and implicates several different bodies of employment law. This Part provides an overview of the mid-term modification problem, beginning in section A with a definition of mid-term modification that distinguishes these legally significant and adverse changes in terms from other informal adjustments in workplace relationships.³¹ Section B examines how courts have approached mid-term modifications across three common scenarios—the unilateral imposition of covenants-not-to-compete, arbitration agreements, and employee handbook modifications subsequent to the start of employment.³² Section C considers possible doctrinal and policy explanations for courts’ inconsistent approaches to mid-term modifications, concluding that courts have failed to justify their disparate approaches to enforcement.³³

A. *The Mid-Term Modification Problem in Employment Law*

Delineating the problem of employment contract modifications requires some initial understanding of what constitutes an employment contract, itself a tenuous thing. Most workers lack a formal written contract purporting to define all of the initial terms of the engagement.³⁴ Rather, the terms of their agreement are likely found in multiple documents and, perhaps more importantly, in oral statements and tacit understandings.³⁵ For those employees that do have formal written agreements, they are likely to be “incomplete.”³⁶ It is impossible to imagine a contract that sets out all of

³⁰ See *infra* notes 300–388 and accompanying text.

³¹ See *infra* notes 34–41 and accompanying text.

³² See *infra* notes 42–133 and accompanying text.

³³ See *infra* notes 134–139 and accompanying text.

³⁴ Common exceptions include written contracts for executive or other high-level employees and collective bargaining agreements for unionized employees.

³⁵ See generally Rachel Arnow-Richman, *Foreword: The Role of Contract in the Modern Employment Relationship*, 10 TEX. WESLEYAN L. REV. 1, 2 (2004) [hereinafter Arnow-Richman, *Foreword*] (describing the “multiple sources of obligation and expectation” in workplace relationships).

³⁶ An incomplete contract is one containing “gaps,” that is, areas in which the parties’ writing fails to define their rights and obligations. See Omri Ben-Shahar, “Agreeing to Disagree”: *Filling Gaps in Deliberately Incomplete Contracts*, 2004 WIS. L. REV. 389, 399 & n.25. There is a rich literature addressing why such gaps exist and how courts should fill them. See, e.g., Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989); Ben-Shahar, *supra*; Wendy Netter Epstein, *Facilitating Incomplete Contracts*, 65 CASE W. RES. L. REV. 297 (2014); Claire A. Hill, *Bargaining in the Shadow of the Law-*

the terms and expectations of what is likely to be an evolving and potentially long-term work relationship. Even if it could be done at the outset, it would likely change over time.

The “relational” nature of employment is thus the reason why rules of modification are both necessary and elusive.³⁷ Currently, both workers and employers operate in a state of perpetual uncertainty as to which promises are contractually binding, which reflect extra-contractual norms, and which are mere aspirations, not rising to the level of a promise at all.³⁸ The inevitable disputes take various forms. Frequently, an employee asserts that he or she was contractually promised some form of job security or a specific term or benefit of employment. The employer may respond that the particular promise was not made, was not contractual, or, if it was contractual, that the particular promise was revised or retracted. In another class of disputes, it is the employer who seeks to enforce an allegedly binding promise of the em-

suit: A Social Norms Theory of Incomplete Contracts, 34 DEL. J. CORP. L. 191 (2009); Juliet P. Kostritsky, *Taxonomy for Justifying Legal Intervention in an Imperfect World: What to Do when Parties Have Not Achieved Bargains or Have Drafted Incomplete Contracts*, 2004 WIS. L. REV. 323; Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. LEGAL STUD. 271 (1992); Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641 (2003).

³⁷ The term “relational contract” is often used to describe long-term contracts between parties whose behavior and expectations regarding contract performance and termination are heavily influenced by their extra-contractual understandings, which may not be reflected in the letter of their agreement. On the general subject of relational contract theory, see IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT* (1980); Jay M. Feinman, *Relational Contract Theory in Context*, 94 NW. U. L. REV. 737 (2000); Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981); Ian R. Macneil, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340 (1983) [hereinafter Macneil, *Values in Contract*]. For a consideration of the problems posed by changes in circumstances and contract modification within relational contracts, see Macneil, *supra* note 13. For articles applying relational contract theory to the specific context of employment, see Robert Bird, *Employment as a Relational Contract*, 8 U. PA. J. LAB. & EMP. L. 149 (2005); Paul J. Gudel, Essay, *Relational Contract Theory and the Concept of Exchange*, 46 BUFF. L. REV. 763 (1998).

³⁸ See Arnow-Richman, *Foreword*, *supra* note 35, at 2–3. As the author has previously explained,

Given the multiple sources of obligation and expectation in the workplace, it is often difficult to determine what should happen in the event of a dispute. Which of the parties’ promises are gratuitous and which carry the force of law? . . . [S]ome workplace “promises” are not even statements, but are simply implicit in the parties’ understanding of how things work between them.

Id. Some commentators use the term “social contract” or “psychological contract” to describe the extra-contractual expectations of employers and employees. See, e.g., Larry A. DiMatteo et al., *Justice, Employment, and the Psychological Contract*, 90 OR. L. REV. 449, 462 (2011); Denise M. Rousseau, *Psychological and Implied Contracts in Organizations*, 2 EMP. RESP. & RTS. J. 121, 123 (1989); Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 550 (2001).

ployee, such as a promise not to compete or to arbitrate any disputes, made at or after the start of employment.

No single theory of employment contracts can resolve all of these disputes. It makes sense, however, to treat at least a subset of them uniformly, at least where the factual context suggests that contract modification rules should apply. This would include all situations where the employer, acting as the drafting party, explicitly alters previously governing terms during the course of the employment relationship with the intention that the new terms are themselves contractually binding—what this Article calls “mid-term modifications.”

Several recurring fact scenarios fall within this frame. First, an employer may ask an incumbent employee to sign a contractual document relinquishing pre-existing background rights. Where an employer imposes a noncompete, for instance, it requires the employee to give up his or her default right to compete post-employment.³⁹ Similarly, where the employer imposes an arbitration agreement, it requires the employee to forego his or her right to litigate disputes in court in favor of the private process selected by the employer.⁴⁰ Second, employers may make changes to their own internal policies that eliminate previously conferred contractual benefits. If the employment relationship is governed by a contractually binding personnel policy or employee handbook, the employer’s alteration of those documents in ways adverse to the employee has the effect of extinguishing previously held contractual rights.

All of these scenarios are distinguishable from the informal “changes” in employment “terms”—staffing decisions, work instructions, personnel actions, etc.—that parties likely anticipate as part of the natural ebb and flow of a dynamic work relationship. In contrast, a mid-term modification

³⁹ A noncompete, in effect, extends the employee’s tort duty of loyalty, which otherwise endures only as long as the employment relationship continues and specifically preserves the employee’s right to prepare to compete post-departure. *See, e.g.*, *Jet Courier Serv., Inc. v. Mulei*, 771 P.2d 486, 498 (Colo. 1989) (applying the planning and preparations exception to the duty of loyalty); *Scanwell Freight Express STL, Inc. v. Chan*, 162 S.W.3d 477, 479–81 (Mo. 2005) (same); *see also* RESTATEMENT (THIRD) OF AGENCY § 8.04 (“Throughout the duration of an agency relationship . . . an agent may take action, not otherwise wrongful, to prepare for competition following termination of the agency relationship.”).

⁴⁰ This includes statutorily conferred rights, such as the right to a jury trial in pursuing anti-discrimination claims. *See* Reginald Alleyne, *Statutory Discrimination Claims: Rights “Waived” and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381, 383 (1996) (asserting that enforcement of pre-dispute arbitration agreements “permits the relegation of public-law statutory discrimination issues to a forum in which the advantages of judicial review and the relative competence of judges presiding over public trials can be discarded in favor of a procedurally defective private forum”); Griffin Toronjo Pivateau, *Private Resolution of Public Disputes: Employment, Arbitration, and the Statutory Cause of Action*, 32 PACE L. REV. 114, 129–31 (2012) (suggesting that enforcement of pre-dispute arbitration agreements inappropriately subjugates statutory regulation of the employment relationship to principles of private contract).

(1) is implemented through a formal writing; (2) alters an established and enforceable term of the relationship;⁴¹ (3) inures to the detriment of the employee; and (4) is implemented by the employer with the intent that it will be prospectively binding. Given the commonalities in form and effect, it makes sense to conceptualize these changes as a distinct problem and apply a common doctrinal framework in assessing their enforceability. As the next section explains, however, courts have not taken a uniform approach to mid-term modifications.

B. Mid-Term Modifications and the Appeal to Consideration

Employment law currently does not conceive of mid-term modifications as a distinct doctrinal problem. Rather, courts respond contextually to the recurring factual scenarios described above. The jurisprudence, however, reveals a common doctrinal split. In all three contexts, courts divide over whether the employer must provide “additional” consideration for the change in terms. Some courts find a binding modification in the employer’s mere retention of the employee, yet others require an additional benefit to the worker to as a quid-pro-quo for the adverse modification.

This section describes these two approaches—what this Article refers to as the “unilateral modification” approach and the “formal modification” approach—as well as some of the permutations that courts apply in particular factual scenarios.⁴² As this section demonstrates, courts widely favor unilateral modification when analyzing mid-term noncompete agreements,⁴³ whereas in the arbitration context they are more likely to demand separate consideration in the form of a reciprocal promise to arbitrate.⁴⁴ In the handbook context, the law is more contested.⁴⁵ The balance appears to be in favor of unilateral modification, but only where the employer has supplied reasonable notice of the change,⁴⁶ and the dissenting view in favor of formal modification has been cogently articulated.⁴⁷

⁴¹ In this context, “enforceable” means a term that either derives from background common law or statutory law or that has been conferred contractually, as through a binding personnel manual.

⁴² See Arnow-Richman, *Inside Out*, *supra* note 5, at 44–46 (adopting this terminology).

⁴³ See, e.g., *Lucht’s*, 255 P.3d at 1063; *infra* notes 48–75 and accompanying text.

⁴⁴ See, e.g., *Clemmons v. Kansas City Chiefs Football Club, Inc.*, 397 S.W.3d 503, 507–08 (Mo. Ct. App. 2013); *infra* notes 76–103 and accompanying text.

⁴⁵ See *infra* notes 104–133 and accompanying text.

⁴⁶ See, e.g., *Asmus*, 999 P.2d at 78; *infra* notes 104–133 and accompanying text.

⁴⁷ See, e.g., *Demasse*, 984 P.2d at 1153–60 (Jones, J., concurring in part and dissenting in part); *infra* notes 104–133 and accompanying text.

1. Covenants-Not-to-Compete: Continued Employment as Consideration

The most developed jurisprudence on the enforceability of mid-term modifications is found in the context of noncompetes.⁴⁸ Unlike arbitration agreements and employee handbooks, noncompetes have been used by employers for centuries, and the law dates back just as far.⁴⁹ Most jurisdictions have addressed the question whether mid-term noncompetes are enforceable and under what conditions, and the law is relatively settled. The majority of courts have adopted a unilateral modification approach under which employers may introduce mid-term noncompetes as a condition of continued employment.⁵⁰

Lucht's Concrete Pumping, Inc. v. Horner, a 2011 decision from the Colorado Supreme Court, provides an example.⁵¹ In that case, the defendant-employee was a mid-level manager who had been hired to help the company expand its urban-centered operations into outlying mountain regions.⁵² Two years into the relationship, the employer asked the defendant to sign a one-year noncompete.⁵³ The employee obliged, but quit the fol-

⁴⁸ See Lord, *supra* note 15, at 729 (“Virtually all of the reported decisions concerned with the enforceability of promises in an at-will relationship involve disputes regarding the enforceability of restrictive covenants.”).

⁴⁹ See, e.g., *Mitchel v. Reynolds* (1711) 24 Eng. Rep. 347 [350]; see also Daniel P. O’Gorman, *Contract Theory and Some Realism About Employee Covenant Not to Compete Cases*, 65 SMU L. REV. 145, 179–82 (discussing sixteenth-century English law’s rejection of noncompetes and subsequent development of the rule of reason); Stone, *supra* note 38, at 594–95 (discussing eighteenth-century English courts’ scrutiny of noncompetes in order to protect the guild system).

⁵⁰ Several articles have explored under what circumstances noncompetes introduced post-hire should be considered enforceable given the at-will nature of employment. See Leibman & Nathan, *supra* note 4, at 1572–73 (arguing for creation of wrongful discharge statute that would make termination for refusal to sign “afterthought” noncompete actionable and require employer to provide written notice of employee’s wrongful discharge rights upon introducing agreement); Lord, *supra* note 15, at 761–67 (demonstrating that the various judicial rationales for enforcing post-hire noncompetes are theoretically flawed and that courts are effectively enforcing such agreements absent consideration); Tracy L. Staidl, *The Enforceability of Noncompetition Agreements when Employment Is At-Will: Reformulating the Analysis*, 2 EMP. RTS. & EMP. POL’Y J. 95, 118 (1998) (concluding that noncompetes entered into on threat of termination should be unenforceable absent a reciprocal employer promise to terminate only for just cause). The author’s work in this vein has focused on the particular problem of noncompetes introduced on the day the employee begins work or shortly thereafter, a scenario that raises the additional concern that the employer may have acted strategically in delaying delivery of the noncompete terms until after the employee accepted the job. See Arnow-Richman, *Worker Mobility*, *supra* note 4, at 966–67; Arnow-Richman, *Cubewrap Contracts*, *supra* note 2, at 638–41. The following section draws on all of these works.

⁵¹ 255 P.3d 1058.

⁵² *Id.* at 1060.

⁵³ *Lucht’s Concrete Pumping, Inc. v. Horner*, No. 2004-cv-160, 2007 WL 5333883, at *3 (Colo. Dist. Ct. Apr. 20, 2007), *aff’d in part, rev’d in part*, 224 P.3d 355 (Colo. App. 2009), *rev’d*, 255 P.3d 1068.

lowing year to accept a position with a competitor.⁵⁴ In the subsequent suit by the employer for breach of the parties' agreement, the employee contended that the contract was not validly formed because he had not received anything in return for his commitment.⁵⁵ The Colorado Supreme Court rejected this argument, holding that the employer had a legal right to terminate the employee at the time that it proposed the noncompete.⁵⁶ Consequently, its offer to retain the employee in exchange for his promise constituted a forbearance of the employer's legal right to terminate, creating a sufficient consideration for the agreement.⁵⁷

The unilateral modification approach applied in *Lucht's* is appealing from both an administrative and doctrinal perspective. It is easy to apply and it is technically correct under the prevailing interpretation of employment at will. If one accepts the premise that employers can terminate at any time for any or no reason, it follows that they may change terms at any time and for any or no reason.⁵⁸ Each moment of the relationship is a new agreement to continue employment on whatever new terms the parties

⁵⁴ *Lucht's*, 255 P.3d at 1060.

⁵⁵ *Id.*

⁵⁶ *Id.* at 1061 ("In the context of employment, an employer has a legal right to terminate an at-will employee at any time because employment at will is a continuing contract between an employer and an employee that is terminable at the will of either the employer or the employee.")

⁵⁷ *Id.* at 1062–63; see also, e.g., *Perma-Liner Indus., Inc. v. U.S. Sewer & Drain, Inc.*, 630 F. Supp. 2d 516, 522–23 (E.D. Pa. 2008); *Lowry Comput. Prods., Inc. v. Head*, 984 F. Supp. 1111, 1115 (E.D. Mich. 1997); *Digitel Corp. v. Deltacom, Inc.*, 953 F. Supp. 1486, 1496 (M.D. Ala. 1996); *Mouldings, Inc. v. Potter*, 315 F. Supp. 704, 713 (M.D. Ga. 1970); *Mattison v. Johnston*, 730 P.2d 286, 290 (Ariz. Ct. App. 1986); *Research & Trading Corp. v. Powell*, 468 A.2d 1301, 1305 (Del. Ch. 1983); *Ins. Assocs. Corp. v. Hansen*, 723 P.2d 190, 191–92 (Idaho Ct. App. 1986); *Ackerman v. Kimball Int'l, Inc.*, 652 N.E.2d 507, 509 (Ind. 1995); *Puritan-Bennett Corp. v. Richter*, 657 P.2d 589, 591–92 (Kan. Ct. App. 1983); *Cent. Adjustment Bureau v. Ingram Assocs.*, 622 S.W.2d 681, 685 (Ky. Ct. App. 1981); *Cellular One, Inc. v. Boyd*, 653 So.2d 30, 34 (La. Ct. App. 1995); *Brignull v. Albert*, 666 A.2d 82, 84 (Me. 1995); *Simko, Inc. v. Graymar*, 464 A.2d 1104, 1106 (Md. Ct. Spec. App. 1983); *Raines v. Bottrell Ins. Agency, Inc.*, 992 So.2d 642, 646 (Miss. Ct. App. 2008); *Comp. Sales Int'l, Inc. v. Collins*, 723 S.W.2d 450, 451–52 (Mo. Ct. App. 1986); *Sec. Acceptance Corp. v. Brown*, 106 N.W.2d 456, 462–63 (Neb. 1960); *Camco, Inc. v. Baker*, 936 P.2d 829, 831–32 (Nev. 1997) (per curiam); *Smith, Batchelder & Rugg v. Foster*, 406 A.2d 1310, 1312 (N.H. 1979); *Hogan v. Bergen Brunswick Corp.*, 378 A.2d 1164, 1167 (N.J. Super. Ct. App. Div. 1977); *Lake Land Emp't Grp. of Akron, LLC v. Columer*, 804 N.E.2d 27, 32 (Ohio 2004); *Cent. Adjustment Bureau v. Ingram*, 678 S.W.2d 28 (Tenn. 1984); *Summits 7, Inc. v. Kelly*, 886 A.2d 365, 372 (Vt. 2005); *Paramount Termite Control Co. v. Rector*, 380 S.E.2d 922, 926 (Va. 1989), *overruled on other grounds*, *Home Paramount Pest Control Co. v. Shaffer*, 718 S.E.2d 762, 766 (Va. 2011).

⁵⁸ As noted previously, the author rejects this premise in an earlier work, arguing that employment at will is subject to the general contract rule that parties to an agreement of indefinite duration must provide reasonable notice of termination. See Arnow-Richman, *Mainstreaming Employment Contract Law*, *supra* note 25, at 1580–83. The point, however, is that if one accedes to the dominant understanding, a unilateral modification rule is the logical corollary.

choose.⁵⁹ This is an odd way to look at the employment relationship, a matter to which this Article returns in the next section.⁶⁰ For present purposes, it is enough to observe that the characterization yields dissatisfying results in the context of a mid-term noncompete. The legal principle underlying courts' inquiry into the sufficiency of continued employment is that "new" consideration is ostensibly required for a contract modification: the party adversely affected should receive something in exchange for the less favorable terms.⁶¹ If the employer merely continues the employee's at-will employment, that employee is no better off than before the mid-term modification with respect to compensation, benefits, and job security. Now, however, he or she is subject to additional—and potentially onerous—obligations post-employment.⁶²

For these reasons, some courts have rejected unilateral modification in favor of a formal modification rule under which employers must provide consideration additional to continued employment.⁶³ *Labriola v. Pollard Group, Inc.*, a 2014 Washington Supreme Court decision, illustrates this approach.⁶⁴ Similar to *Lucht's*, it involved an at-will sales employee who was asked to sign a noncompete several years into his employment.⁶⁵ The court held that, although the agreement would have been enforceable had it been executed upon hire,⁶⁶ an agreement executed post-hire could only be

⁵⁹ See *Lucht's*, 255 P.3d at 1063 ("By virtue of the nature of at-will employment itself, the presentation of the [noncompete] agreement was an offer to renegotiate the terms of [Defendant]'s at-will employment, which [Defendant] accepted by continuing to work."); *Columber*, 804 N.E.2d at 32 ("The presentation of a noncompetition agreement by an employer to an at-will employee is, in effect, a proposal to renegotiate the terms of the parties' at-will employment.").

⁶⁰ See *infra* notes 134–139 and accompanying text. The author has discussed this issue elsewhere. See Arnow-Richman, *Mainstreaming Employment Contract Law*, *supra* note 25, at 1563–70 (discussing the disconnect between at-will employment and unilateral contract theory).

⁶¹ This is essentially a statement of the pre-existing legal duty rule under general contract law, although courts addressing mid-term modifications do not invoke the doctrine by name. See RESTATEMENT (SECOND) OF CONTRACTS § 73 ("Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration."); see *infra* notes 148–159 and accompanying text. It pertains, however, only where there is a pre-existing "legal duty" to perform, something that is absent in employment-at-will relationships.

⁶² See Lord, *supra* note 15, at 772 & n.149 (citing *Columber*, 804 N.E.2d at 34 (Resnick, J., dissenting)) ("[I]n the end, the employer simply winds up with both the noncompetition agreement and the continued right to discharge the employee at will, while the employee is left with the same preexisting 'nonright' to be employed for so long as the employer decides not to fire him.").

⁶³ See, e.g., *Freeman v. Duluth Clinic, Ltd.*, 334 N.W.2d 626, 630 (Minn. 1983); *Poole v. Incentives Unlimited, Inc.*, 548 S.E.2d 207, 209 (S.C. 2001); *Labriola*, 100 P.3d at 794–95; *Hopper*, 861 P.2d at 541.

⁶⁴ 100 P.3d at 794–96.

⁶⁵ *Id.* at 792; see *Lucht's*, 255 P.3d at 1060.

⁶⁶ Oddly, almost every jurisdiction that rejects continued employment as sufficient consideration for a mid-term noncompete is willing to enforce one entered into at the commencement of at-will employment, notwithstanding the fact that an employer's promise to hire is equally "illusory." See, e.g., *Poole*, 548 S.E.2d at 209 ("[O]rdinarily employment is . . . sufficient consideration to

enforced upon a showing of “independent consideration,” such as “increased wages, a promotion, a bonus, a fixed term of employment, or perhaps access to protected information.”⁶⁷ None of these were provided to the defendant-employee, who experienced no change in status after the non-compete.⁶⁸ Thus, the court found no consideration for the agreement and refused to enjoin the employee’s subsequent competition.⁶⁹

It is uncertain whether the formal modification approach actually addresses the problem that inspired it. As *Labriola* illustrates, some of the most common forms of additional consideration recognized by formal modification courts, including pay raises and promotions, are themselves dependent on continued employment.⁷⁰ It is difficult to explain how such dependent benefits can confer actual value to the employee, constituting valid consideration, when the underlying promise to continue employment remains discretionary.⁷¹

support a restrictive negative covenant, but where the employment contract is supported by the purported consideration of continued employment, there is no consideration when the contract containing the covenant is exacted after several years employment and the employee’s duties and position are . . . unchanged.”); see Lord, *supra* note 15, at 715 (discussing this paradox). Only Texas has rejected the idea that mere at-will employment can constitute consideration for a non-compete under any circumstances, including at the time of hire. See *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 852 (Tex. 2009) (finding enforceable noncompete entered into at the time of at-will hire based on employer’s implicit promise to provide confidential information which employee in fact received). Thus, whatever the wisdom of hinging noncompete enforceability to the presence of consideration “additional” to at-will employment, Texas law is at least internally consistent on this point.

⁶⁷ See *Labriola*, 100 P.3d at 794.

⁶⁸ See *id.* at 795 (“Prior to execution of the 2002 noncompete agreement, Employee was an ‘at will’ Employee. After Employee executed the noncompete agreement, he still remained an ‘at will’ employee . . .”).

⁶⁹ *Id.* at 796; see also *Access Organics, Inc. v. Hernandez*, 175 P.3d 899, 904 (Mont. 2008) (finding no consideration because employee received no additional benefit in exchange for signing a noncompete four months into employment); *Forrest Paschal Mach. Co. v. Milholen*, 220 S.E.2d 190, 195 (N.C. 1975) (finding no consideration because employee received no additional benefit in exchange for signing a noncompete after eight-and-a-half years of employment); *Socko v. Mid-Atl. Sys. of CPA, Inc.*, 126 A.3d 1266, 1275–76 (Pa. 2015); *Poole*, 548 S.E.2d at 209 (finding no consideration because employee’s “duties, position, and salary were left unchanged”); cf. *Freeman*, 334 N.W.2d at 630 (rejecting as consideration indirect benefit that inured to employee as a corporate shareholder); *Hopper*, 861 P.2d at 541 (finding sufficient consideration because employee received a pay raise after signing a noncompete while already employed). At least one state has codified this approach. See OR. REV. STAT. § 653.295 (2015) (requiring that a noncompete must either be presented to the employee in advance of employment or “entered into upon a subsequent bona fide advancement of the employee by the employer”).

⁷⁰ See *Labriola*, 100 P.3d at 794 (citing as examples of additional consideration “increased wages, a promotion, a bonus, a fixed term of employment, or . . . access to protected information”).

⁷¹ See Lord, *supra* note 15, at 741 (observing that a “promise of a raise cannot be consideration for an at-will employee’s promise not to compete, since the promised raise might never be given, and the employee could be terminated immediately after signing the covenant”).

Perhaps for this reason, other courts sympathetic to the position of the employee have tinkered with the application of the unilateral modification approach rather than search for some new or additional benefit. Thus some courts have held that continued employment counts as consideration only if expressly indicated: either the agreement must recite that the employee's promise is in exchange for retaining employment, or the employer must make clear that absent the employee's assent he or she will be terminated.⁷² Others require that the employer actually retain the employee for an indefinite period of time.⁷³ In such jurisdictions, the promise of continued at-will employment ostensibly constitutes consideration, but enforcement of the agreement hinges on the degree to which the employee actually benefited from the promise.⁷⁴

Whether these tweaks in fact mitigate the harsh effects of a pure unilateral approach,⁷⁵ they are the exceptions rather than the rule. In most jurisdictions, continued employment alone is sufficient consideration to support a noncompete agreement added during the course of employment. In those states, employers may freely introduce noncompetes at any point in the employment relationship, subject only to the noncompete-specific restrictions imposed by state law on the scope of those agreements. Defenses to enforcement based on contract formation principles have little traction.

2. Arbitration Agreements: The Reciprocal Promise to Arbitrate

Courts appear more willing to police contract formation in cases involving mid-term arbitration agreements. As in the noncompete context, some courts find consideration for the change of terms in the employer's

⁷² See, e.g., *Ackerman*, 652 N.E.2d at 509 (finding consideration because employer explicitly promised continued employment); *NBZ, Inc. v. Pilarski*, 520 N.W.2d 93, 97 (Wis. Ct. App. 1994) (finding no consideration because employer did not "condition[] employment or promise[] to do anything in exchange for [the employee] signing the covenant").

⁷³ See, e.g., *Cent. Adjustment Bureau*, 622 S.W.2d at 685 (finding consideration where employees received continued employment for "years" after signing noncompete); *Brignull*, 666 A.2d at 84 (finding consideration where employee received continued employment for three years after signing noncompete); cf. *Diederich Ins. Agency, LLC v. Smith*, 952 N.E.2d 165, 169 (Ill. App. Ct. 2011) (finding insufficient consideration where employee was terminated three months after signing noncompete).

⁷⁴ This is arguably the most logically flawed of the various approaches. These courts essentially hold that an illusory promise can be cured by gratuitous post-hoc performance, a concept anathema to the notion that consideration requires a "bargained for" exchange. RESTATEMENT (SECOND) OF CONTRACTS § 71; see Lord, *supra* at note 15, at 765 (critiquing such courts for concluding that "what was initially a bad bilateral bargain . . . can become a good unilateral contract").

⁷⁵ An approach that enforces mid-term noncompetes only if explicitly agreed to on penalty of termination creates a perverse incentive for employers to threaten their employees and to follow through on their threats when their demands are not obliged.

continued employment of the employee.⁷⁶ But in contrast to noncompete law, courts assessing mid-term arbitration agreements incline toward a formal modification approach, scrutinizing the content of the agreement to determine whether the employer made a reciprocal promise. Absent an employer promise to arbitrate its own claims or otherwise be bound by the policy, many will reject the agreement as unenforceable for lack of consideration despite the promise or presence of continued employment.⁷⁷

Clemmons v. Kansas City Chiefs Football Club, Inc., a 2013 Missouri Court of Appeals decision, offers an example of this reciprocal promise requirement.⁷⁸ In that case the employee served as the defendant-football team's controller until he was terminated at age sixty.⁷⁹ In his subsequent age discrimination suit, the employer sought to enforce the arbitration agreement the employee had signed in the second year of his thirty-eight year career.⁸⁰ The Missouri Court of Appeals held the agreement was unenforceable for lack of consideration.⁸¹ It found that the employer made no reciprocal promise to arbitrate, nor any other future promise to the employee in the parties' agreement.⁸² The court concluded that the mere promise of continued at-will employment could not serve as consideration, reasoning that absent an express duration or other constraint on the employee's ability to terminate "any alleged promise . . . was illusory and invalid."⁸³ It reached this result despite Missouri precedent recognizing continued employment as

⁷⁶ See, e.g., *Tillman v. Macy's, Inc.*, 735 F.3d 453, 462 (6th Cir. 2013); *Soto v. State Indus. Prod., Inc.*, 642 F.3d 67, 75 (1st Cir. 2011); *McNamara v. Yellow Transp., Inc.*, 570 F.3d 950, 956 (8th Cir. 2009); *Dantz v. Am. Apple Grp., LLC*, 123 F. App'x 702, 709 (6th Cir. 2005); *Tinder v. Pinkerton Sec.*, 305 F.3d 728, 736 (7th Cir. 2002); *Kelly v. UHC Mgmt. Co.*, 967 F. Supp. 1240, 1260 (N.D. Ala. 1997); *Fahim v. CIGNA Inv., Inc.*, No. 3:98CV232, 1998 WL 1967944, at *3 (D. Conn. Sept. 10, 1998); *Gadsden Budweiser Distrib. Co., Inc. v. Holland*, 807 So.2d 528, 531 (Ala. 2001); *Melena*, 847 N.E.2d at 109; see also Richard A. Bales, *Contract Formation Issues in Employment Arbitration*, 44 BRANDEIS L.J. 415, 456–57 (2006) (discussing court decisions finding continued employment sufficient consideration for arbitration agreement).

⁷⁷ See, e.g., *Batory v. Sears, Roebuck & Co.*, 124 F. App'x 530, 534 (9th Cir. 2005); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1376 (11th Cir. 2005); *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1108 (9th Cir. 2002); *Blair v. Scott Specialty Gases*, 283 F.3d 595, 603 (3d Cir. 2002); *Melton v. Philip Morris, Inc.*, 71 F. App'x 701, 703 (9th Cir. 2003); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 275 (4th Cir. 1997); *Tinder*, 305 F.3d at 736; *Clemmons*, 397 S.W.3d at 507; *Toney v. EQT Corp.*, No. 13-1101, 2014 WL 2681091, at *3 (W. Va. June 13, 2014); *Harmon v. Philip Morris, Inc.*, 697 N.E.2d 270, 272 (Ohio Ct. App. 1997); see also Bales, *supra* note 76, at 453–55 (discussing court decisions requiring some form of reciprocal promise by the employer for enforceable arbitration agreement).

⁷⁸ 397 S.W.3d 503.

⁷⁹ *Id.* at 505.

⁸⁰ *Id.*

⁸¹ *Id.* at 507–08.

⁸² *Id.*

⁸³ *Id.* at 507 (explaining that "[t]he Chiefs could have fired Clemmons fifteen minutes after he signed the Agreement without suffering any legal consequences because his employment remained at-will").

consideration in the noncompete context, which it neither referenced nor distinguished.⁸⁴

Clemmons offers a straightforward example of the application of the formal modification rule in a state that applies the unilateral approach to noncompetes. *Clemmons* is factually unique, however. Few arbitration agreements lack a reciprocal employer promise of some sort. An employer's agreement to be bound to its chosen form of dispute resolution sacrifices little,⁸⁵ while providing a form of return consideration distinct from continued employment that can ensure enforceability in the face of uncertain law.⁸⁶ For this reason, a number of decisions enforcing mid-term arbitration agreements do so on the basis of the employer's reciprocal promise without addressing the significance of continued employment at will.⁸⁷ Others hold that *both* continued employment *and* the employer's reciprocal promise

⁸⁴ See *JumboSack Corp. v. Buyck*, 407 S.W.3d 51, 57 (Mo. Ct. App. 2013); *Collins*, 723 S.W.2d at 452; *Ranch Hand Foods, Inc. v. Polar Pak Foods*, 690 S.W.2d 437, 442 (Mo. Ct. App. 1985). The *Clemmons* court also rejected the argument that *Clemmons*'s subsequent employment made up for this failure by noting, "A contract cannot be formed in retrospect." 397 S.W.3d at 507. That argument—however flawed in its logic—has been accepted by several courts, including in Missouri, in the context of mid-term noncompetes. See *supra* notes 48–75 and accompanying text.

⁸⁵ The stakes for employers are especially low if the employer carves out any claims for which it might pursue emergency injunctive relief, such as misappropriation of trade secrets or breach of a restrictive covenant. Courts have split on whether an arbitration agreement that excepts the most common, and arguably the most critical, employer claims is so one-sided as to be unconscionable. Compare *Grabowski v. Robinson*, 817 F. Supp. 2d 1159, 1173–74 (S.D. Cal. 2011) (finding an arbitration agreement carve-out exempting restrictive covenant, intellectual property, and other claims was lacking mutuality and thus unconscionable as such claims were more likely to be brought by the employer than the employee), and *Colvin v. NASDAQ OMX Grp., Inc.*, No. 15-cv-02078-EMC, 2015 WL 6735292, at *5 (N.D. Cal. Nov. 4, 2015) (finding similar carve-out for intellectual property claims unconscionable), with *Kepas v. eBay*, 412 F. App'x 40, 48 (10th Cir. 2010) (holding a similar carve-out was sufficiently bilateral and not unconscionable because such claims were likely to be brought by both the employer and employee since the employer was a "technology company"), and *Caley*, 428 F.3d at 1378 (holding that although the carve-out exempted likely claims by the employer and covered likely claims by the employee, it nevertheless was not unconscionable because mutuality of remedy is not required under Georgia law), and *Fuqua v. SVOX AG*, 13 N.E.3d 68, 82 (Ill. Ct. App. 2014) (holding arbitration agreement carve-out for restrictive covenants was enforceable and not unconscionable where the employee successfully negotiated for a reciprocal carve-out).

⁸⁶ See DAVID S. BAFFA ET AL., SEYFARTH SHAW, LLP, GUIDANCE FOR EMPLOYERS CONSIDERING MANDATORY ARBITRATION AGREEMENTS WITH CLASS AND COLLECTIVE ACTION WAIVERS 7 (2013), http://www.seyfarth.com/dir_docs/publications/GuidanceMandatoryArbitration.pdf [<https://perma.cc/GN9J-LJGT>] (recommending that employer policies contain, in addition to a reciprocal promise, "processes that place limits on the timing and method for modifying the arbitration agreement" to avoid illusory consideration problems). See generally *Mandatory Arbitration of Employment Claims*, 223 EMP. L. COUNSELOR 1 (2009) (calling attention to extent uncertainty over existence of sufficient consideration for post-hire arbitration agreements).

⁸⁷ See, e.g., *Hardin v. First Cash Fin. Servs., Inc.*, 465 F.3d 470 (10th Cir. 2006); *Batory*, 124 F. App'x 530; *Caley*, 428 F.3d 1359; *Najd*, 294 F.3d 104; *O'Neil*, 115 F.3d 272; *Snow v. BE & K Constr. Co.*, 126 F. Supp. 2d 5 (D. Me. 2001).

constitute the requisite consideration.⁸⁸ Such decisions reveal a preference for the formal modification approach, but are sufficiently ambiguous as to leave open the possibility that the court would opt for a unilateral approach in the absence of a reciprocal promise.

On the other hand, for some courts even a reciprocal promise is not enough to support a mid-term arbitration agreement. Some refuse to find consideration where the employer makes a reciprocal promise, but retains the right to modify the arbitration policy.⁸⁹ *Piano v. Premier Distributing Co.*, a 2004 New Mexico Court of Appeals decision, illustrates the distinction.⁹⁰ There the employer adopted an arbitration agreement during the course of the employee's employment, which provided that the employer was similarly bound to the process and could not change it absent a signed writing by the company owner.⁹¹ The court refused to enforce the agreement for lack of consideration. It held that neither the employer's promise of continued employment nor its promise to abide by the policy constituted consideration for the modification.⁹² Regarding the former, the court held that at-will employment could not constitute consideration because it "placed no constraints on Defendant's future conduct," leaving retention of the employee entirely within the company's discretion.⁹³ Regarding the latter, it held that

⁸⁸ See *Brondyke v. Bridgepoint Educ., Inc.*, 985 F. Supp. 2d 1079, 1096 (S.D. Iowa 2013) (holding that the employee's "continued employment and the parties' mutual promise to resolve their disputes in binding arbitration constitute consideration"); *Nuzzi v. Coachmen Indus., Inc.*, No. 3:09-CV-116, 2009 WL 3851364, at *4-5 (N.D. Ind. Nov. 16, 2009) (deciding that the employer "allowing plaintiff to continue to work for them constituted adequate consideration" and "that the employer is willing to give up its own legal right to defend itself in court, and submit its defense to arbitration, constitutes consideration"); *Fisher v. GE Med. Sys.*, 276 F. Supp. 2d 891, 895 (M.D. Tenn. 2003) (concluding that "both the plaintiffs' continued employment and the parties' mutual promises to be bound by the Program serve as adequate consideration to make an enforceable contract" (emphasis added)); cf. *Soto*, 642 F.3d at 73-74 (holding that continued employment was sufficient consideration, and finding that there was mutual obligation because the arbitration agreement would only stand if both parties stipulated to it).

⁸⁹ *Snow*, 126 F. Supp. 2d at 14-15 (holding that the employer's unilateral authority to modify the arbitration agreement made its promise to arbitrate insufficient, illusory consideration); *Piano v. Premier Distrib. Co.*, 107 P.3d 11, 16 (N.M. Ct. App. 2004) (same); *Harmon*, 697 N.E.2d at 272 (holding that no consideration was given to the employee for agreeing to arbitrate where the employer reserved the right to amend or terminate the program at any time and because employees were at will). See generally Michael L. DeMichele & Richard A. Bales, *Unilateral-Modification Provisions in Employment Arbitration Agreements*, 24 HOFSTRA LAB. & EMP. L.J. 63, 69-74 (2006) (discussing some courts' refusal to enforce arbitration agreements when employers reserve right to modify).

⁹⁰ 107 P.3d 11.

⁹¹ *Id.* at 13.

⁹² *Id.* at 14-16.

⁹³ *Id.* at 14.

the employer's ability to unilaterally modify the agreement without need for employee approval rendered its promise to arbitrate equally illusory.⁹⁴

To be sure, there are some courts that apply a unilateral modification rule to mid-term arbitration agreements, consistent with the majority approach to midterm noncompetes.⁹⁵ But for others, a different set of rules appears to be afoot,⁹⁶ and few courts acknowledge, let alone defend, the distinction.⁹⁷ One explanation for closer scrutiny of arbitration agreements

⁹⁴ *Id.* at 16; see Bales, *supra* note 76 at 455–57 (describing how courts have found at-will employment insufficiently binding on employers to be consideration). *But see Blair*, 283 F.3d at 604 (deciding that consideration existed because employer could unilaterally alter arbitration agreement only after putting any changes in a writing and submitting them to employee); *Sisneros v. Citadel Broad. Co.*, 142 P.3d 34, 43 (N.M. Ct. App. 2006) (finding adequate consideration because the employer could not unilaterally alter or terminate the arbitration policy once employee's claims had accrued).

⁹⁵ Jurisdictions that appear to apply a consistent unilateral rule to both contexts include Illinois, *compare Melena*, 847 N.E.2d at 109 (arbitration agreement), *with Curtis 1000, Inc. v. Suess*, 24 F.3d 941, 947 (7th Cir. 1994) (noncompete); Michigan, *compare Tillman*, 735 F.3d at 462 (agreement), *with Head*, 984 F. Supp. at 1115 (noncompete); and South Dakota, *compare McNamara*, 570 F.3d at 956 (arbitration agreement), *with Cent. Monitoring Serv., Inc. v. Zakinski*, 553 N.W.2d 513, 518 (S.D. 1996) (noncompete). For a rare example of a court explicitly relying on noncompete law in the arbitration context, see *Dantz*, 123 F. App'x at 709 (citing *Columber*, 804 N.E.2d at 31–32) (noting that the Ohio Supreme Court had recognized the sufficiency of continued employment as consideration for a mid-term noncompete in upholding the disputed arbitration agreement).

⁹⁶ The following jurisdictions appear to apply a formal modification rule to arbitration agreements yet apply a unilateral modification rule to noncompetes: Washington, D.C., *compare Jenkins v. United Healthcare*, No. C.A. 7371-99, 2000 WL 298912, at *2 (D.C. Super. Ct. Feb. 16, 2000) (finding insufficient consideration for mid-term arbitration agreement despite employer's continued employment of employee and mutual agreement to arbitrate), *with Ellis v. James V. Hurson Assocs., Inc.*, 565 A.2d 615, 620 (D.C. 1989) (holding continued employment is sufficient consideration for a mid-term noncompete where employer actually employs employee for a substantial period); Georgia, *compare Caley*, 428 F.3d at 1376 (holding employer's promises to arbitrate its claims and pay costs of arbitration were sufficient consideration for a mid-term arbitration agreement), *with Mouldings*, 315 F. Supp. at 713 (holding continued employment is sufficient consideration for a mid-term noncompete); Maine, *compare Snow*, 126 F. Supp.2d at 14–15 (holding continued employment was illusory consideration where handbook containing arbitration agreement was modifiable and disclaimed contractual status), *with Brignull*, 666 A.2d at 84 (holding continued employment is sufficient consideration for a mid-term noncompete); Maryland, *compare Mould v. NJG Food Serv. Inc.*, 986 F. Supp. 2d 674, 679 (D. Md. 2013) (holding continued employment is insufficient consideration for a mid-term arbitration agreement and that a mutual promise to arbitrate is required), *with Simko*, 464 A.2d at 1106 (holding continued employment is sufficient consideration for a mid-term noncompete); and Missouri, *compare Baker*, 450 S.W.3d at 777 (holding that neither continued employment nor reciprocal promises to arbitrate constitute sufficient consideration for a mid-term arbitration agreement where employee is at will), *with Collins*, 723 S.W.2d at 452 (holding that continued employment is sufficient consideration for a mid-term noncompete).

⁹⁷ For a rare but stark example, see *Jenkins*, 2000 WL 298912, at *1–2 & n.1 (citing *Ellis*, 565 A.2d 615) (“Although there is case law that permits the court to conclude that continuing employment with a company after receipt of its arbitration policies may constitute a binding agreement, this court concludes that the instant set of facts does not warrant this conclusion.”); *cf. Baker*, 450 S.W.3d at 792 (Wilson, J., dissenting) (criticizing the majority for “apply[ing] one rule

may be the various constraints imposed by the Federal Arbitration Act (“FAA”), which limits the grounds on which courts may void arbitration agreements. Although courts subject noncompetes to state law restrictions on their scope and effect, they are expressly prohibited from developing any state-specific enforcement limitations that single out arbitration agreements.⁹⁸ This means that courts have no way to police arbitration agreements other than through the identification of contract formation defects. The more incisive examination of these issues in the arbitration context may reflect a policy choice by some courts to restrict arbitration through the few legal tools ostensibly available to them.

Another possibility is that courts choose to rest enforcement on the employer’s reciprocal promise rather than continued employment in service to the U.S. Supreme Court’s separability doctrine. Where an arbitration agreement ostensibly governs the parties’ dispute, the FAA limits judicial jurisdiction to determining whether the arbitration agreement was validly formed.⁹⁹ In a series of cases, the Court has interpreted this to mean that courts should decline to rule on challenges to arbitration that rest on the contractual legitimacy of the parties’ overall contract.¹⁰⁰ By focusing on the reciprocal promise to arbitrate and resisting an assessment of the validity of continued employment, courts implicitly sever the agreement from the larger relationship for purposes of adjudicating contractual validity.¹⁰¹

to an employee’s non-compete promises but . . . a different rule if the case involves an employee’s arbitration promise”).

⁹⁸ See Federal Arbitration Act, 9 U.S.C. § 2 (2012). The Act states,

[A] contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*

Id. (emphasis added).

⁹⁹ See 9 U.S.C. § 4 (2012) (“[U]pon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration . . .”).

¹⁰⁰ See, e.g., *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 448 (2006); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967); see also Stephen J. Ware, *Arbitration Law’s Separability Doctrine After Buckeye Check Cashing, Inc. v. Cardegna*, 8 NEV. L.J. 107, 115–17 (2007) (discussing sources and contours of the doctrine).

¹⁰¹ See, e.g., *Cheek v. United Healthcare of the Mid-Atl., Inc.*, 835 A.2d 656, 666 (Md. 2003) (invoking separability doctrine in declining to follow case law recognizing an offer of at-will employment as consideration for an arbitration agreement entered into at the start of employment). This is not to suggest that the separability doctrine requires this approach. Indeed, the scope (and wisdom) of the doctrine is subject to significant dispute. See Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819, 827, 845 (2003) (arguing that “separability perverts contract law because it assumes away the fundamental principle of contractual consent”

Alternatively, courts' reliance on a reciprocal promise may simply be a means of sidestepping the difficult question of consideration in the context of at-will employment. If the employer has promised to arbitrate, then the court need not struggle to reconcile the "illusory" nature of at-will employment with the contractual requirement of a binding exchange.

Either way, it is difficult to square the rejection of continued employment as consideration in the arbitration context with the majority rule accepting it in the noncompete context. From a doctrinal perspective, once the employee's assent is established, the question whether the employer provided consideration for the modification is the same.¹⁰² Particularly in those jurisdictions that adopt the unilateral approach for mid-term noncompetes, one would expect courts to similarly treat continued employment at will as sufficient consideration for an employee's promise to arbitrate. Indeed courts are precluded from applying contract principles in ways that "disfavor" arbitration agreements.¹⁰³ Yet many appear loath to rest enforcement on continued employment alone. Whatever the reason, when it comes to arbitration, courts generally hinge their decision on the presence or absence of a reciprocal promise by the employer and require one that is truly binding.

and "should be repudiated as archaic, unworkable"); Ware, *supra* note 100, at 121 (arguing that separability is incompatible with the contractual approach to arbitration, since it separates arbitration law from defenses to enforcement); cf. Kenneth R. Davis, *A Model for Arbitration Law: Autonomy, Cooperation and Curtailment of State Power*, 26 FORDHAM URB. L.J. 167, 195–96 (1999) (arguing that compelling arbitration under the separability doctrine despite allegations of fraud "would trample the aggrieved party's freedom of contract"). *But see* Alan Scott, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1, 3 (2003) (arguing that despite criticism from respectable academics, separability is "abundantly unproblematic[]").

¹⁰² Mid-term arbitration agreements may take the form of general employer policies, and can consequently raise assent issues not present in the case of noncompetes, which are always formed through an individually signed, written agreement. Where, for instance, the employer notifies its workforce of its arbitration policy through an e-mail or by web posting, treating the employee's choice to continue employment as acceptance seems suspect. Courts generally require that, at a minimum, the employee had actual notice of the arbitration policy for purposes of assent regardless of their position on continued retention of the employee as consideration. *See, e.g.,* Campbell v. Gen. Dynamics Gov't Sys. Corp., 407 F.3d 546, 555–59 (1st Cir. 2005) (finding that an e-mail announcing a new arbitration policy did not give the employee sufficient notice for purposes of assent); Hudyka v. Sunoco, Inc., 474 F. Supp. 2d 712, 716–17 (E.D. Pa. 2007) (same); Acher v. Fujitsu Network Commc'ns, Inc., 354 F. Supp. 2d 26, 36–37 (D. Mass. 2005) (holding that an employee did not have notice of an arbitration agreement posted on the employer's website). Courts have occasionally imposed a higher threshold for assent akin to a knowing and voluntary standard. *See* Bales, *supra* note 76, at 449–50. It is likely, however, that such an approach violates the FAA's interdiction against state law rules that disfavor arbitration. *See id.* at 450.

¹⁰³ *Concepcion*, 536 U.S. at 363–65. At least one dissenting opinion has contended that the failure to follow state law regarding noncompete formation to arbitration agreements violates the FAA. *See Baker*, 450 S.W. at 792 (Wilson, J., dissenting).

3. Employee Handbooks: Unilateral Modification Plus Reasonable Notice

Employee handbooks and personnel policies present a third mid-term modification scenario, with yet another set of variations. In this context, courts have similarly split between those permitting unilateral modification and those requiring formal modification. In contrast to both noncompete and arbitration law, however, courts applying the unilateral modification approach to handbook and policy revisions generally require employers to supply reasonable notice of the proposed change.¹⁰⁴ Thus, handbook law appears to offer something of a middle way between the approaches reflected in the noncompete and arbitration jurisprudence.¹⁰⁵

Asmus v. Pacific Bell, decided by the California Supreme Court in 2000, is perhaps the definitive case.¹⁰⁶ At issue was Pacific Bell's discontinuance of its Management Employment Security Policy ("MESP"), which promised management employees "employment security through reassignment to and retraining for other management positions" in the event of job elimination.¹⁰⁷ After approximately six years, Pacific Bell replaced its MESP with a policy designed to decrease managerial staff through severance and benefit incentives.¹⁰⁸ A group of affected managers sued for breach of contract.¹⁰⁹ The employer conceded for purposes of the litigation that the original policy was contractually binding and that no material economic event precluded its continued enforcement.¹¹⁰ The California Su-

¹⁰⁴ See, e.g., *Asmus*, 999 P.2d at 71.

¹⁰⁵ See Katherine M. Apps, *Good Faith Performance in Employment Contracts: A "Comparative Conversation" Between the U.S. and England*, 8 U. PA. J. LAB. & EMP. L. 883, 901 (2006) (describing the reasonable notice of handbook modification rule as an "unsurprising . . . in-between approach" adopted in the face of "conceptual confusion over the appropriate policy and legal basis for handbook variation"). For other articles discussing courts' struggle to determine the appropriate legal standard for enforcing handbook modifications, see W. David Slawson, *Unilateral Contracts of Employment: Does Contract Law Conflict with Public Policy?*, 10 TEX. WESLEYAN L. REV. 9, 10–11 (2003); Brian T. Kohn, Note, *Contracts of Convenience: Preventing Employers from Unilaterally Modifying Promises Made in Employee Handbooks*, 24 CARDOZO L. REV. 799, 804–05 (2003); Jason A. Walters, Comment, *The Brooklyn Bridge Is Falling Down: Unilateral Contract Modification and the Sole Requirement of the Offeree's Assent*, 32 CUMB. L. REV. 375, 375–76 (2002); Bryce Yoder, Note, *How Reasonable is "Reasonable"?* *The Search for a Satisfactory Approach to Employment Handbooks*, 57 DUKE L.J. 1517, 1517–22 (2008). The following section draws from these works.

¹⁰⁶ 999 P.2d 71.

¹⁰⁷ *Id.* at 73.

¹⁰⁸ *Id.* at 73–74.

¹⁰⁹ *Id.* at 74.

¹¹⁰ *Id.* The original policy contained a clause stating that it "will be maintained so long as there is no change that will materially affect Pacific Bell's business plan achievement." *Id.* at 73. The fact that the policy contained this express limitation was arguably critical to the resolution of the case, but was disregarded by the majority based on the stipulations of the parties. See *id.* at 84–89 (George, C.J., dissenting) (concluding that the MESP was a contract with a fixed duration un-

preme Court held that Pacific Bell was not required to provide additional consideration to its workforce in exchange for retracting the MESP other than continued employment of the affected workers.¹¹¹ Rather, the court concluded that an employer may unilaterally terminate a contractual personnel policy “as long as its action occurs after a reasonable time, and is subject to prescribed or implied limitations, including reasonable notice.”¹¹² The court did not expound either on the meaning of “implied limitations” or what would constitute “reasonable notice.” A vigorous dissent asserted that formal modification—requiring new consideration from the employer and actual employee assent—was the proper approach.¹¹³

Of all of the mid-term modification scenarios, it is surprising that courts would favor unilateral modification in the handbook context given the nature of the underlying rights. As *Asmus* illustrates, the terms at issue in handbook modification disputes generally involve limitations on the employer’s right to terminate.¹¹⁴ This would appear to do away with the rationale for the unilateral modification approach articulated by courts in the noncompete and arbitration contexts. If the employer’s original handbook altered the at-will nature of the relationship, then the employer is no longer in a position to lawfully terminate the employee and rehire on new terms. Whereas the employee faced with a mid-term noncompete or arbitration agreement is at will, the employee in the handbook context is ostensibly protected by the policy’s original terms. Unilateral modification in this context would appear to be the equivalent of a breach of contract.

Those decisions eschewing unilateral modification in the handbook context—and most commentators opining on the subject—take this position.¹¹⁵ For instance, *Demasse v. ITT Corp.*, a 1999 Arizona Supreme Court decision, involved the retraction of a handbook policy providing that employees would be terminated in reverse order of seniority in the event of a company layoff.¹¹⁶ A subsequent version of the handbook eliminated the

der which the employer’s ability to terminate the policy was conditional on its demonstration of a material change in circumstances).

¹¹¹ *Id.* at 81 (majority opinion).

¹¹² *Id.*

¹¹³ *Id.* at 89–90 (George, C.J., dissenting). The dissent’s primary argument, however, was that the propriety of the modification should have been determined based on the material alteration clause contained in the original policy. *Id.* at 84–89.

¹¹⁴ At least this is true for cases that are litigated. It is easy to imagine disputes arising over changes in other policies, such as vacation, compensation, and benefits policies. In those situations, the unilateral modification argument, whatever its worth, retains its integrity.

¹¹⁵ For a critique of the unilateral modification plus notice rule and, in particular, the *Restatement of Employment Law*’s adoption of this position, see Matthew W. Finkin et al., *Working Group on Chapter 2 of the Proposed Restatement of Employment Law: Employment Contracts: Termination*, 13 EMP. RTS. & EMP. POL’Y J. 93, 130–33 (2009).

¹¹⁶ 984 P.2d at 1140.

seniority-based policy and provided that employees would be selected for layoff based on performance and ability.¹¹⁷ In a breach of contract claim by laid-off employees, the Arizona Supreme Court, on certified question from the U.S. Court of Appeals for the Ninth Circuit, concluded that effective modification requires both employee assent and “separate” consideration.¹¹⁸ Assent, according to the court, means affirmative steps taken with knowledge of the proposed change.¹¹⁹ Separate consideration requires something beyond mere continued employment. Anything else, reasoned the court “brings us to an absurdity: the employer’s threat to breach its promise of job security provides consideration for its rescission of that promise.”¹²⁰

Despite the “absurdity,” the *Restatement of Employment Law* recently approved the holding in *Asmus*, adopting unilateral modification upon reasonable notice as the proper test for determining the enforceability of handbook revisions.¹²¹ Tellingly, the *Restatement* drafters did not offer a contracts-based rationale for its rule, but rather analogized the promulgation and alteration of employer policies to the administrative agency rulemaking process whereby agencies adopt and revise regulations upon notice and comment.¹²²

This notion that handbook rights arise outside the traditional contract framework may explain the reluctance of some courts to apply a formal modification analysis to revisions. The Supreme Court of Michigan said as much in addressing the issue in 1987 in *Bankey v. Storer Broadcasting Co.*¹²³ In that case, the original manual expressly provided that employees could be discharged only for cause.¹²⁴ A few months before the plaintiff’s termination, the employer removed the “for cause” phrase from the manual, substituting a statement that employment was at will.¹²⁵ On certified question from the U.S. Court of Appeals for the Sixth Circuit, the court rejected the contract-based arguments of both parties, holding that employer policies

¹¹⁷ *Id.* at 1141.

¹¹⁸ *Id.* at 1142, 1145.

¹¹⁹ *Id.* at 1145 (“[T]he employee does not manifest consent to an offer modifying an existing contract without taking affirmative steps, beyond continued performance, to accept.”).

¹²⁰ *Id.*; see also Apps, *supra* note 105, at 893 (“This [unilateral modification] approach has drastic results for employees . . . as, by refusing to accept the new terms, they are caught between a metaphorical rock and a hard place. . . . [T]he employment contract practically evaporates.”). For other decisions rejecting the unilateral modification approach, see *Torosyan v. Boehringer Ingelheim Pharm., Inc.*, 662 A.2d 89, 99 (Conn. 1995); *Doyle v. Holy Cross Hosp.*, 708 N.E.2d 1140 (Ill. 2009); *Brodie v. Gen. Chem. Corp.*, 934 P.2d 1263, 1268–69 (Wyo. 1997).

¹²¹ See RESTATEMENT OF EMP’T LAW § 2.06; *Asmus*, 999 P.2d 71.

¹²² See RESTATEMENT OF EMP’T LAW § 2.05 cmt. b.

¹²³ 443 N.W.2d 112 (Mich. 1987).

¹²⁴ *Id.* at 114.

¹²⁵ *Id.*

could be revoked unilaterally upon reasonable notice.¹²⁶ The court explained its decision by invoking the underlying rationale for judicial recognition of binding employer policies. Such policies are enforceable, according to the court, not as a matter of strict contract law, but because employers implicitly benefit from the more productive and committed workforce that good personnel policies occasion.¹²⁷ Although employees reasonably expect employers to abide by their policies while they are in force, they also understand that those policies will change in accordance with the needs of the business: “The very definition of ‘policy’ negates a legitimate expectation of permanence.”¹²⁸

Even in jurisdictions that purport to treat handbooks as the equivalent of traditionally formed contracts, a close reading of the cases reveals skepticism about the scope and legitimacy of the employees’ original job security rights. The litigation posture of handbook modification cases generally presumes both that the employer’s original policy eliminated the right to terminate at will and that it became contractually binding. This was the case in *Demasse*, where the Arizona Supreme Court, adopting the formal modification approach, emphasized that its decision was based on the phrasing of the certified question, which incorporated those premises.¹²⁹ The dissent, in contrast, questioned whether the manual contained binding promises in light of the employer’s inclusion of a disclaimer¹³⁰ and implied that even a con-

¹²⁶ *Id.* at 121.

¹²⁷ *Id.* at 119. As the court explained,

[A]n employer who chooses to establish desirable personnel policies, such as a discharge-for-cause employment policy, is not seeking to induce each individual employee to show up for work day after day, but rather is seeking to promote an environment conducive to collective productivity. The benefit to the employer of promoting such an environment, rather than the traditional contract-forming mechanisms of mutual assent or individual detrimental reliance, gives rise to a situation “instinct with an obligation.”

Id. (citing *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880, 892 (Mich. 1980)); see also Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13 INDUS. REL. L.J. 326, 343 (1993) (“The notion of a bargained-for exchange in this setting is a . . . convenient and understandable [fiction]. These advantages have induced courts to stretch unilateral contract theory in order to achieve a desirable policy result: the enforcement of handbook promises that benefit employers by creating legitimate expectations among the work force.”).

¹²⁸ *Bankey*, 443 N.W.2d at 120.

¹²⁹ *Demasse*, 984 P.2d at 1148 (“[T]he question certified requires us to assume the handbook and whatever other dealings may have taken place between ITT and the *Demasse* employees created a contractual provision that restricted ITT’s ability to discharge.”).

¹³⁰ The disclaimer was itself added subsequent to the original policy, see *id.* at 1141, but the dissents did not address this detail, see *id.* at 1153–60 (Jones, J., concurring in part and dissenting in part); *id.* at 1160–61 (Martone, J., concurring in part and dissenting in part).

tractually binding layoff policy could not have altered the employees' at-will status.¹³¹

Thus, the strongly divergent opinions in the handbook context may best be explained by different views of the facts rather than the law. Courts espousing unilateral modification plus notice may be misapplying their rule, granting summary judgment to employers in situations that call for a factual inquiry into the job security status of the affected employees.¹³² This should not obscure the critical innovation of a reasonable notice requirement as a supplement to the unilateral modification approach. The additional requirement of reasonable advance notice has the potential to temper the harsh effects of the "pure" unilateral rule frequently applied to noncompetes and at times to arbitration agreements. Part III will explore this possibility further in calling for a uniform reasonable notice approach to mid-term modifications of at-will relationships.¹³³ For now it is sufficient to note that the handbook cases further muddy the water for any attempt to discern a coherent approach to mid-term modifications.

C. The Law and Policy of Mid-Term Modification Jurisprudence

As the preceding section demonstrates, the law of mid-term modifications is inconsistent at best. There appear to be two basic approaches: unilateral, under which continued employment alone will suffice as consideration; and formal, under which some form of "separate" consideration is required. Courts' preference for one approach over the other, as well as the nuances in how those approaches apply, vary by jurisdiction and within jurisdictions across different substantive areas.

It is difficult to explain these deviations from a doctrinal perspective. Courts analyzing mid-term modifications generally treat employment as a unilateral contract under which the employer's offer of employment constitutes an enforceable promise to pay the employee if he or she performs according to the proffered terms.¹³⁴ Only one side is bound—the employer—

¹³¹ *Id.* at 1156 (Jones, J., concurring in part and dissenting in part). Certainly one can draw a meaningful distinction between the rights conferred by a seniority-based layoff policy and the rights conferred by manuals that explicitly or implicitly promise discharge only for cause. Where employers are free to terminate at will, even if obliged to follow certain protocols in exercising that right, modifications of their personnel policies should seemingly be analyzed in the same way that other mid-term agreements are analyzed. This Article revisits this distinction *infra* notes 316–344 and accompanying text.

¹³² This Article returns to this question in greater detail *infra* notes 372–388 and accompanying text.

¹³³ See *infra* notes 215–295 and accompanying text.

¹³⁴ See, e.g., *Asmus*, 999 P.2d at 81 (describing a company's management security policy as an "implied in-fact unilateral contract," the modification of which was accepted by employees via their continued employment); *Torosyan*, 662 A.2d at 96 ("To determine the contents of any par-

and only if the employee chooses to accept. As will be discussed in Part III, unilateral contract theory is a poor fit for employment, and bilateral contract analysis can arguably provide a more accurate and coherent description of the relationship. But accepting the prevailing framework, courts' analysis of mid-term modifications does not follow from their initial premises. If the employment relationship is a unilateral contract that employees are free to reject and employers free not to renew at any point, then unilateral modification should be the unequivocal rule for all modifications with the limited exception of cases in which the at-will relationship has been altered. This would mean that a pure unilateral approach would apply equally to all non-compete and arbitration modifications, and courts would not need to scrutinize whether a particular arbitration policy included a reciprocal, non-modifiable promise on the part of the employer. Handbook modification cases would also follow a pure unilateral modification rule except where the employer had previously contracted to provide long-term job security, as opposed to some other type of employment benefit. In those situations, formal modification would be the rule. Notice would seem to have no place in the analysis.

The absence of doctrinal consistency would be understandable if courts' deviation from general rules of contract law reflected a coherent policy choice. But courts' consideration of the policy implications of their decisions is both minimal and simplistic. In the noncompete context, for instance, some decisions espousing the minority view in favor of formal modification invoke fairness to the employee as a justification. These courts point out that an employee who receives nothing other than continued at-will employment in exchange for signing a noncompete has received nothing more than what he or she already had—a job with no secure future.¹³⁵

ticular implied contract of employment, the factual circumstances of the parties' relationship must be examined in light of legal rules governing unilateral contracts."); *Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 630 (Minn. 1983) (describing employer's personnel manual as an "offer of a unilateral contract" that the employee accepted through "continued performance of his duties despite his freedom to quit"); *Woolley*, 491 A.2d at 1267 (describing an employer's personnel manual as "an offer that seeks the formation of a unilateral contract—the employees' bargained-for action needed to make the offer binding being their continued work when they have no obligation to continue"); see also 2-6 CORBIN, *supra* note 12, § 6.2 (discussing use of unilateral contract theory in employment law); Mark Pettit, Jr., *Modern Unilateral Contracts*, 63 B.U. L. REV. 551, 559–67 (1983) (discussing employment law's expansion of unilateral contract theory); Yoder, *supra* note 105, at 1523 (discussing courts' application of unilateral contract analysis to handbooks).

¹³⁵ See *Kadis v. Britt*, 29 S.E.2d 543, 548 (N.C. 1944) ("A consideration cannot be constituted out of something that is given and taken in the same breath—of an employment which need not last longer than the ink is dry upon the signature of the employee . . ."); *Labriola*, 100 P.3d at 795 ("Employer did not incur additional duties or obligations from the noncompete agreement. Prior to [its] execution . . . Employee was an 'at will' Employee. After Employee executed the noncompete agreement, he still remained an 'at will' employee . . .").

This is a legitimate critique of the unilateral modification approach, but one that can equally be levied at the formal modification approach. Requiring the employer to provide a raise, promotion, or other benefit in addition to continued employment does not change the employee's at will status.¹³⁶ The extent to which the employee receives anything of value for the agreement still rests on the employer's discretionary decision to continue employment.

On the flip side, those decisions espousing unilateral modification in the handbook context often invoke employers' need for flexibility. According to these decisions, employers must maintain freedom to adjust their internal policies in the face of changing market conditions.¹³⁷ Such decisions also note employers' need for uniformity and the administrative burdens of a formal modification rule requiring new consideration and individual employee assent.¹³⁸ The invocation of these business interests, however, neglects to account for the fact that the employers in such cases elected to commit to the original policy on which they intended their workforce to rely.¹³⁹ Contract enforcement is about giving effect to the legitimate expectations engendered by voluntary promises. To the extent employers find themselves hemmed in by their policies or unable to efficiently administer them, these are problems of their own making.¹⁴⁰

II. CONTRACT MODIFICATION LAW

What the law of employment modification lacks, the law of mainstream contract modification may be able to supply. Contract law under-

¹³⁶ The author has raised this concern previously in the particular context of handbook modification. See Rachel Arnow-Richman, *Response to Working Group on Chapter 2 of the Proposed Restatement of Employment Law: Putting the Restatement in Its Place*, 13 EMP. RTS. & EMP. POL'Y J. 143, 155 (2009) ("[H]ow much do workers stand to gain from . . . a rule requiring the employer to provide separate consideration in addition to . . . notice of a change in handbook terms? It is easy . . . for the employer to grant the worker an extra vacation day, or some other peppercorn, in satisfaction of that requirement.").

¹³⁷ See, e.g., *Demasse*, 984 P.2d at 1156 (Jones, J., concurring in part and dissenting in part).

¹³⁸ See, e.g., *Bankey*, 443 N.W.2d at 119–20 ("If an employer had amended its handbook from time to time, . . . the employer could find itself obligated in a variety of different ways to any number of different employees, depending on the modifications which had been adopted and the extent of the work force turnover.").

¹³⁹ Professor David Slawson has made a related argument that permitting unilateral modification of handbooks deprives employers of the ability to offer contractually binding job security in situations where they genuinely wish to promote employee retention and possibly avoid unionization. See Slawson, *supra* note 105, at 31.

¹⁴⁰ See *id.* at 29 ("[A]n employer that finds itself with a confusing mix of unjustifiably different employment [handbook] rights for different employees has only itself to blame. If making contracts unwisely were a sufficient reason for getting out of them, contracts would be of little value to anyone.").

stands modification as the inevitable result of imperfect prediction.¹⁴¹ Life changes. This is the reason that parties contract to begin with: to stake out a reasonable space of security in the face of an uncertain future—as well as the reason they may seek to modify those same contracts—as where changes in circumstances reach beyond what was or could have been anticipated at the outset of their relationship.¹⁴² Thus, the law of contract modification must strike a balance between parties' need for certainty and their need for flexibility.¹⁴³

Achieving that balance has been a struggle. Historically courts used consideration as the touchstone for determining the enforceability of modifications, much as they use that doctrine today in the context of mid-term modifications of employment. But contract law has long since retreated from that approach in favor of one that emphasizes fairness and voluntariness. The contemporary rule as to the enforceability of modifications, although still contested in many ways, is ultimately about good faith.¹⁴⁴

This Part explores the evolution of the contemporary doctrine of good faith modification, laying the groundwork for a good faith-based analysis of mid-term modification of employment relationships.¹⁴⁵ Section A discusses the traditional common law approach to contract modification under which enforceability depends on the presence of “new” consideration.¹⁴⁶ Section B describes the erosion of this rule under the Uniform Commercial Code (“UCC”) and *Restatement (Second) of Contracts* and the contemporary law's focus on good faith and voluntariness.¹⁴⁷

¹⁴¹ See Robert A. Hillman, *Contract Modification Under the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 680, 681 (1982) (“Contracting parties often desire to alter their agreements in response to changes in circumstances or of mind.”).

¹⁴² See Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465, 478 (“At the most basic level, contract law promises to remedy breaches of contract and provide security of expectations. It does this only indirectly and imperfectly. It helps reassure us about the stability of an ever changing and frightening world.”).

¹⁴³ See Macneil, *Values in Contract*, *supra* note 37, at 362 (discussing the value of peace in contractual relations because “conflict exists between the need for measurement and specificity, for precision and focus, and for adherence to planning, and the need for flexibility to meet countless kinds of changed circumstances”).

¹⁴⁴ See U.C.C. § 2-209(1) cmt. 2 (“[A]n agreement modifying a sales contract needs no consideration to be binding. However, modifications made thereunder must meet the test of good faith imposed by this Act.”).

¹⁴⁵ See *infra* notes 144–212 and accompanying text.

¹⁴⁶ See *infra* notes 148–159 and accompanying text.

¹⁴⁷ See *infra* notes 165–212 and accompanying text.

A. The Traditional Approach: Consideration and the Pre-Existing Legal Duty Rule

Historically, the law of contract modification was the law of pre-existing legal duties. That concept embraces the idea that a performance that a contracting party is already legally obligated to provide cannot constitute consideration.¹⁴⁸ If *A* is under contract to mow *B*'s lawn for \$25, *A*'s promise to mow the lawn cannot support an additional, subsequent promise from *B*, such as a promise to pay an additional \$5 for the job.¹⁴⁹ The effect of the pre-existing legal duty rule ("PELDR") is to render modifications to existing contracts unenforceable absent some new or additional consideration from the party advantaged by the modification.

The intent of the PELDR was to prevent coercion.¹⁵⁰ Where a party is free to insist on favorable changes in terms post-contract formation, there is significant risk of overreaching. For instance, *B* might schedule *A* to mow her lawn before an important event, such as an open house for the sale of her property. When the time for performance arrives, *A*, knowing *B*'s situation, could seek to double the agreed-upon price on threat of non-performance. *B*, having no time to find a replacement mower, would be compelled to agree. Strict application of the PELDR prevents this type of "hold up game," rendering *B*'s reluctant promise of increased compensation non-binding.¹⁵¹

Ironically, contract law's chestnut case evidencing the risk of coercion and the need for a strict PELDR involved a labor dispute—one in which the victim, at least as presented in the opinion, was the employer. In *Alaska Packers' Ass'n v. Domenico*, a 1902 U.S. Court of Appeals for the Ninth Circuit decision, fishermen who had been recruited to work in a remote area of Alaska during the winter salmon run refused to continue their work with-

¹⁴⁸ RESTATEMENT (SECOND) OF CONTRACTS § 73 (AM. LAW INST. 1981) ("Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration."); see *infra* notes 178–212 and accompanying text.

¹⁴⁹ 2-7 CORBIN, *supra* note 12, § 7.1. An illustration is instructive:

If *A* promises to build a house in return for *B*'s promise to pay a sum of money, this transaction creates a duty in *A*. But if, after this transaction has occurred, there is a subsequent agreement whereby *B* induces *A* to build the identical house in return for a second promise of new compensation, made either by *B* or by *X*, the consideration for this new promise is nothing but the performance by *A* of *A*'s already existing duty created by the first transaction.

Id.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* ("The [PELDR] had its origins in the striking down of coerced modifications. There have been tough cases in which one contracting party has been subjected to a holdup game, so that the promisor made the new promise under some degree of economic duress.")

out an increase in their base wages.¹⁵² The employer agreed to the increase, but at the end of the season, refused to pay anything above the original contract wages.¹⁵³ Calling it a classic example of the type of strong-armed modifications the PELDR was designed to prevent, the court held for the company.¹⁵⁴

Yet strict application of the PELDR will often preclude enforcement of seemingly legitimate modifications. Returning to the prior hypothetical, suppose that the morning that *A* is to mow *B*'s lawn, the city issues an advisory recommending that all citizens stay indoors due to excessive heat. Well before the time for performance, *A* advises *B* that he is willing to mow her lawn despite the advisory if she will agree to a modest price increase, and *B* gratefully agrees. The modification appears to be fairly reached and reasonable in light of the circumstances, however, it too is likely unenforceable under a strict reading of the pre-existing legal duty rule. *A* was already obligated to mow *B*'s lawn at the original price regardless of the temperature. *A*'s recommitment to providing that same service cannot supply consideration for the additional money *B* has promised to pay.

Not surprisingly, courts have been eager to avoid such results.¹⁵⁵ Initially they did so by leveraging legal fictions in the context of seemingly fair modifications. Under what one might call the “rescission/new contract” approach, courts concluded that the parties had mutually agreed to forego their previously existing contract rights and entered into a replacement contract.¹⁵⁶ Under this view, each party agrees (as a theoretical matter) to give up its rights under the first agreement in exchange for the other party's release of the same. The parties then agree (again, theoretically) to form a new agreement under the terms of the modification. Because this contract is ostensibly formed on fresh ground, the PELDR poses no obstacle to enforcement.¹⁵⁷

¹⁵² 117 F. 99 (9th Cir. 1902).

¹⁵³ *Id.* at 101.

¹⁵⁴ *Id.* at 104. There is of course another version to the story. The fishermen alleged that the netting and equipment supplied by their employer were of poor quality, reducing their catch and justifying the increase in their base pay. *Id.* at 101. The court found it not credible that the employer, which stood to profit from a large catch, would have provided inferior equipment. *Id.* *But see* Debora L. Threedy, *A Fish Story: Alaska Packers' Association v. Domenico*, 2000 UTAH L. REV. 185, 211–12 (suggesting reasons why the employer might have had an incentive to reduce volume based on the size of the season's run and the capacity of its cannery). Had the fishermen's version of the facts been credited, it may it may have changed the result—the additional work necessitated by the poor nets could have been considered an additional detriment to the fishermen, justifying the increased pay.

¹⁵⁵ See Robert A. Hillman, *Policing Contract Modifications Under the U.C.C.: Good Faith and the Doctrine of Economic Duress*, 64 IOWA L. REV. 849, 852 (1979) (describing courts' resistance to the PELDR which acted as “a roadblock to the free adjustment of contracts”).

¹⁵⁶ See *id.* at 853 (discussing this approach).

¹⁵⁷ *Id.*

Alternatively, under what one might call the “nominal benefit” approach, courts simply found some token additional consideration flowing from the party seeking the modification to the party accepting it.¹⁵⁸ Thus, in the price renegotiation between *A* and *B*, if *A* were to promise that, rather than begin the job at 8:30 a.m., as previously agreed, he will begin fifteen minutes earlier at 8:15, *B*’s promise to pay more for the job would become enforceable. It does not matter that this additional promise is a trifle or that the primary consideration sought by *B*’s promise continues to be the mowing service *A* is already obligated to provide. Because courts do not inquire into the adequacy of consideration, all that matters is that something new has been supplied.¹⁵⁹

These early interventions proved problematic. In addition to lacking intellectually integrity, the approaches failed to achieve the desired result of policing modifications. The legal fiction of a rescission and new contract could apply to any situation, including those in which the “agreement” was procured in hasty or coercive circumstances.¹⁶⁰ As for the nominal benefit theory, evidence of a trifle consideration arguably does more to suggest sharp practices than to assuage concerns over whether an agreement had been fairly modified. The *Restatement (Second) of Contracts* mitigates this problem somewhat, providing that an enforceable modification must differ from the original bargain “in a way which reflects more than a pretense of a bargain.”¹⁶¹ Courts have not vigorously enforced this caveat, however, and the doctrine of “sham” consideration appears to be one with limited bite.¹⁶² A different approach was needed.

¹⁵⁸ *Id.* at 855.

¹⁵⁹ 2-7 CORBIN, *supra* note 12, § 7.20 (“[I]f the bargained-for performance rendered by the promisee includes something that is not within the requirements of the promisee’s pre-existing duty, the law of consideration is satisfied. . . . It is enough that some small additional performance is bargained for and given.”). The original *Restatement of Contracts* enabled such results, providing that a modification was enforceable if the return consideration differed in any way from what was presumed by the original bargain. RESTATEMENT OF CONTRACTS § 84(c) (AM. LAW INST. 1932); *see also* Hillman, *supra* note 155, at 854 (describing the theory as “incentive for a promise to create sham consideration”).

¹⁶⁰ *See* David V. Snyder, *The Law of Contract and the Concept of Change: Public and Private Attempts to Regulate Modification, Waiver, and Estoppel*, 1999 WIS. L. REV. 607, 618 (“There are only a couple of problems with the rescission device: It has virtually no basis in reality, and it applies just as logically to a coerced modification as to an innocent one.”).

¹⁶¹ RESTATEMENT (SECOND) OF CONTRACTS § 73.

¹⁶² It appears that the sham consideration doctrine has been invoked primarily in situations where there is a true failure of consideration or a recited consideration is not actually transferred or agreed upon. *See, e.g.,* Weed v. Weed, 968 A.2d 310, 314 (Vt. 2008) (holding that \$10 recited consideration was not valid where deed was executed prior to receipt and money was not supplied until lawyer subsequently expressed concern about enforceability). It is unlikely to nullify a modification where there is an actual change in performance, however modest. *See* Snyder, *supra* note 160, at 615–16 (expressing doubt whether the sham consideration doctrine can do much to preclude coerced modifications as the doctrine merely asks whether consideration exists and not

B. The Modern Approach: Good Faith and Voluntariness

Over time, the common law retreated further from the PELDR and the new consideration inquiry. Although concern remained over the risk of coerced modifications, it was clear that the absence of consideration was an inadequate proxy for the problem. The drafting of the *Restatement (Second) of Contracts* and the UCC reflected these developments by reframing the issue more directly around whether a particular modification is fair and fairly reached. Subsection 1 discusses the *Restatement's* departure from the PELDR.¹⁶³ Subsection 2 explores the UCC's rejection of the doctrine.¹⁶⁴

1. The Common Law Unanticipated Circumstances Exception

In the case of the *Restatement*, the drafters retained the PELDR as a basic principle,¹⁶⁵ but crafted an exception intended to capture those situations in which a modification is likely to be both fair and voluntary despite the absence of consideration.¹⁶⁶ Under section 89, a modification of a contract “not fully performed on either side” is enforceable so long as it is “fair and equitable in view of circumstances not anticipated by the parties when the contract was made.”¹⁶⁷ The inquiry proposed by the drafters goes in part to the content of the new bargain: revised terms must be justified by unforeseen circumstances that the parties failed to account for.¹⁶⁸ It also polices the process by which the modification is reached, albeit indirectly, through the requirement that the contract be fully executory. The risk of coercion is strongest where one party has fully performed and the other has not.¹⁶⁹ The requirement that both sides still hold part of the original consideration ostensibly weeds out the most egregious overreaching scenarios.

Angel v. Murray, a 1974 Rhode Island Supreme Court decision, exemplifies the application of the modern rule.¹⁷⁰ There the promisor was a waste

whether it is adequate). For a more thorough discussion of courts' treatment of nominal consideration and the sham consideration doctrine, see Joseph Siprut, Comment, *The Peppercorn Reconsidered: Why a Promise to Sell Blackacre for Nominal Consideration Is Not Binding, but Should Be*, 97 NW. U. L. REV. 1809 (2003).

¹⁶³ See *infra* notes 165–177 and accompanying text.

¹⁶⁴ See *infra* notes 178–212 and accompanying text.

¹⁶⁵ RESTATEMENT (SECOND) OF CONTRACTS § 73.

¹⁶⁶ *Id.* § 89.

¹⁶⁷ *Id.*

¹⁶⁸ See *id.* § 89 cmt b. This limitation “goes beyond absence of coercion and requires an objectively demonstrable reason for seeking a modification.” *Id.*

¹⁶⁹ Completion of construction post-payment is often cited as the paradigmatic scenario. A builder under contract to erect a house who has not fully completed the project, but has received all of his or her pay, is in a stronger position to extract a promise of additional compensation in exchange for completion than the builder who is still awaiting final payment. See *Alaska Packers' Ass'n*, 117 F. at 102–03 (discussing this scenario).

¹⁷⁰ 322 A.2d 630, 636–38 (R.I. 1974).

collector under a five-year agreement to collect all residential waste in the city.¹⁷¹ In the third year of the contract he requested that the city pay him an additional sum per annum to reflect the fact that unanticipated real estate growth had led to an increase in the volume of waste to be collected.¹⁷² The city called a public hearing and agreed to the increase by vote of the city council. Upon a subsequent challenge to the modification,¹⁷³ the court held that the increased payments were enforceable notwithstanding the fact that the collector was already under contract to collect all residential waste.¹⁷⁴ It noted that the modification satisfied all three elements of *Restatement* section 89: two years of collection services and payment for same were yet to be rendered, the increase in residential development went beyond that which had been typical of the community and anticipated at contract formation, and the city agreed to the increase through a fair and open process.¹⁷⁵

The adoption of *Restatement* section 89 was neither a watershed nor a panacea. Courts had already been avoiding the PELDR, and it is not clear that the *Restatement* had the effect of broadening those rulings.¹⁷⁶ Nor have courts coalesced around the *Restatement's* articulation of the circumstances justifying an exception, which arguably do a reasonable job of weeding out coercive modifications, but may not cast the net wide enough in saving legitimate ones.¹⁷⁷ The point, however, is that the *Restatement* placed an imprimatur on what was a growing trend against formal doctrine. The exceptions had now officially swallowed the rule.

¹⁷¹ *Id.* at 632.

¹⁷² *Id.*

¹⁷³ The challenge was not by the city itself, but was brought by a concerned taxpayer following the city's expenditure of the additional sums. The fact that the city remained willing to abide, and indeed did abide, by its modification makes the case unique as an example of voluntariness. *Id.*

¹⁷⁴ *Id.* at 637–38.

¹⁷⁵ *Id.*

¹⁷⁶ See Snyder, *supra* note 160, at 619 (concluding that *Restatement* section 89 does not “advance the doctrine much beyond those cases that would dig into the facts and find consideration somewhere . . . to support an equitable modification” under the prior law).

¹⁷⁷ It is possible, for instance, that a modification may be fair and equitable although it is only partially executory, as where a significant and unanticipated obstacle to completion of executory performance is discovered or occurs after the promisee has received full consideration. *B's* promise to provide additional compensation to *A* for mowing her lawn during an excessive heat advisory would be no less equitable if she happened to pay *A* his fee in advance the day before. See *supra* notes 148–162 and accompanying text. Similarly, the modification seems fair and equitable despite the fact that, depending on the season or location, excessive heat could arguably have been foreseen. For these reasons, it is probably fair to characterize *Restatement* section 89 as replacing a technical rule with a technical exception.

2. Good Faith Modifications Under the UCC

The UCC put the final nail in the coffin, rejecting the PELDR altogether for transactions in goods. Section 2-209(1) of the Code states that a modification of a contract within the Act “needs no consideration to be binding.”¹⁷⁸ The explicit purpose of the section is to do away with the common law’s overly technical treatment of modifications and grant parties greater latitude to adjust their relationship as needed.¹⁷⁹ Rather than attempt to police modifications through consideration or other proxies, the drafters deferred the problem of potentially coercive modifications to the Code’s overarching duty of good faith.¹⁸⁰

Good faith has itself been a contested concept in mainstream contract law. Current article 1 of the UCC defines good faith simply as “honesty in fact” and “the observance of reasonable commercial standards of fair dealing.”¹⁸¹ The contours of the duty have been framed largely in theoretical terms. Commentators have debated whether good faith imposes a general duty—that is, a contractual obligation to avoid any form of “bad faith” behavior¹⁸²—or whether good faith merely precludes the use of contractually reserved discretion to reclaim a foregone benefit.¹⁸³ As such descriptions

¹⁷⁸ U.C.C. § 2-209(1).

¹⁷⁹ *Id.* § 2-209(1) cmt. 1 (“This section seeks to protect and make effective all necessary and desirable modifications of sales contracts without regard to the technicalities which at present hamper such adjustments.”); see *Wis. Knife Works v. Nat’l Metal Crafters*, 781 F.2d 1280, 1285–86 (7th Cir. 1986) (discussing history of section 2-209 and its rejection of the common law); Hillman, *supra* note 155, at 856 (same); Snyder, *supra* note 160, at 622–24.

¹⁸⁰ See U.C.C. § 1-304 (“Every contract or duty within [the UCC] imposes an obligation of good faith in its performance and enforcement.”). Commentators have consistently lamented this indirect appeal to good faith, noting that the standard for fair modifications ought to appear in the actual text of section 2-209. See Hillman, *supra* note 155, at 900; Snyder, *supra* note 160, at 623–24.

¹⁸¹ U.C.C. § 1-201(20). This adoption represented an expansion from the original definition, which was limited to subjective honesty alone, except in the case of merchants. U.C.C. §§ 1-201(19), 2-103(1)(b) (AM. LAW INST. & NAT’L CONFERENCE OF COMM’RS ON UNIFORM STATE LAW 2000). The *Restatement (Second) of Contracts* adopts a similarly, and more explicitly, expansive view of good faith, one that “emphasizes . . . consistency with the justified expectations of the other party” and excludes conduct that “violate[s] community standards of decency, fairness or reasonableness.” RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a.

¹⁸² See Robert S. Summers, “Good Faith” in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 207 (1968) [hereinafter Summers, *Good Faith*]; Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 818–21, 825–30 (1982). Professor Robert Summers has famously described good faith as an “excluder,” incapable of specific definition, that prohibits a variety of behaviors, including evasion and delay, willful underperformance, obstructing performance, and similar conduct. See Summers, *Good Faith*, *supra*, at 201.

¹⁸³ See Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 372–73 (1980). Professor Steven Burton has proposed a narrow definition of good faith that finds a breach only where a party abuses contractually conferred discretion to recapture opportunities sacrificed at contract formation. See *id.* For a useful summary of

suggest, questions as to the scope of good faith resonate principally in the context of disputed performance. The paradigmatic good faith case involves a party tendering performance that meets the letter of the parties' agreement while violating the spirit of their bargain. In such cases, good faith serves as a tool of contract interpretation.

Modification, on the other hand, presents an issue of contract formation. The question is whether the new terms were fairly obtained and meaningfully accepted so as to obviate the need for consideration. In this context, the law reflects the themes of coercion and efficiency that heralded the abandonment of the common law rule. A modification is deemed enforceable where the party requesting the change acted "consistent with 'reasonable commercial standards of fair dealing . . . ' and . . . [was] motivated . . . by an honest desire to compensate for commercial exigencies."¹⁸⁴ The two-part inquiry tracks the objective and subjective components of good faith as defined in UCC article 1.¹⁸⁵ Courts must examine the surrounding circumstances to determine whether the request for the modification was both commercially justifiable and honestly obtained.

The U.S. Court of Appeals for the Sixth Circuit's 1983 decision in *Roth Steel Products v. Sharon Steel Corp.* is considered a leading case on good faith modification.¹⁸⁶ The underlying dispute concerned a year-long contract for the sale of various types of steel tubing from Sharon Steel to Roth Steel.¹⁸⁷ Subsequent to the agreement, significant changes in the steel market dramatically affected the price and availability of the product.¹⁸⁸ Sharon unilaterally notified Roth that it would not honor its prices, leading to protests and negotiation.¹⁸⁹ Roth reluctantly agreed to a price increase and subsequently tolerated significant delivery delays, assuming they were the result of raw material shortages and Sharon's allocation system.¹⁹⁰ It later discovered that Sharon had prioritized large quantities of tubing for

the dominant theories of good faith, see Emily M.S. Houh, *Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law*, 88 CORNELL L. REV. 1025, 1033–49 (2003).

¹⁸⁴ *Roth Steel Prods. v. Sharon Steel Corp.*, 705 F.2d 134, 146 (6th Cir. 1983) (citation omitted).

¹⁸⁵ See Jason Scott Johnston, *Default Rules/Mandatory Principles: A Game Theoretic Analysis of Good Faith and the Contract Modification Problem*, 3 S. CAL. INTERDISC. L.J. 335, 376–78 (1993) (discussing relationship between the general duty of good faith and its application in the modification context); Irma S. Russell, *Reinventing the Deal: A Sequential Approach to Analyzing Claims for Enforcement of Modified Sales Contracts*, 53 FLA. L. REV. 49, 67–72 (2001) (discussing subjective and objective requirements of good faith for merchants under the UCC).

¹⁸⁶ 705 F.2d 134.

¹⁸⁷ *Id.* at 137–38.

¹⁸⁸ *Id.* at 138.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 138–39.

sale to a subsidiary capable of selling the product on the market at higher prices.¹⁹¹ Roth sued for breach.¹⁹²

Assessing the validity of the modification, the court had no difficulty concluding that the parties' price adjustment satisfied the first element of the test for good faith. "[T]he single most important consideration," the court explained, "is whether, because of changes in the market or other unforeseeable conditions, performance of the contract has come to involve a loss."¹⁹³ The court concluded that the multiple exigencies facing Sharon Steel would prompt an ordinary merchant to seek a price increase in order to avoid a loss on the contract.¹⁹⁴

On the second element, however, the court was more opaque. The requirement of "subjective honesty," it began, means that the modification "was, in fact, motivated by a legitimate commercial reason and . . . not offered merely as a pretext."¹⁹⁵ Such language suggests a causal inquiry: the factfinder should determine whether the market change was the actual reason for the requested modification. The court went on to say, however, that "the trier of fact must determine whether *the means* used to obtain the modification are an impermissible attempt to obtain a modification by extortion or overreaching."¹⁹⁶ Such language, by contrast, suggests an assessment of process: a court should determine whether the manner by which the modification was secured created an unfair advantage.¹⁹⁷

Unfortunately, the court's relatively brief analysis of the second element of the UCC modification test does little to elucidate its meaning. The facts presented would have supported a conclusion that the modification lacked good faith from a causal perspective. One could argue that if Sharon had quantities of tubing earmarked for its subsidiary, then market conditions were not the direct, or at least not the sole, reason for its price demands and delivery delays. But the court did not focus on this. Rather it adopted the district court's finding that Sharon had "threatened" not to sell steel as obligated by the contract and that "consequently, Sharon acted wrongfully."¹⁹⁸ In so doing it rejected Sharon's argument that its unilateral price adjustment was contractually permissible in the face of industry-wide market conditions, noting that this theory had not been offered at the time modification

¹⁹¹ *Id.* at 139.

¹⁹² *Id.* at 140.

¹⁹³ *Id.* at 147.

¹⁹⁴ *Id.* at 146–47.

¹⁹⁵ *Id.* at 146.

¹⁹⁶ *Id.* (emphasis added).

¹⁹⁷ Indeed, the court dropped a footnote likening the inquiry to a procedural unconscionability analysis. *Id.* at 146 n.24.

¹⁹⁸ *Id.* at 148.

was sought.¹⁹⁹ Distinguishing cases involving legitimate invocation of contractually reserved discretion, the court held that Sharon had not “rebutted the inference of bad faith that rises from its coercive conduct.”²⁰⁰ Thus, it appears the court’s decision was based on the manner in which the modification was obtained: the buyer’s accession to the price increase was a response to threatened non-performance rather than the product of reasoned negotiation.²⁰¹

In this way, the section 2-209 good faith analysis is reminiscent of the defense of economic duress, which focuses on the “wrongfulness” of the promisee’s behavior and its effects on the promisor. As traditionally conceived, duress precludes enforcement of an agreement achieved by a wrongful threat that overcomes free will.²⁰² As elaborated upon in the modification context, courts will refuse to enforce a supposedly voluntary modification where agreement was procured through a threat of breach and the subjugated party was unable to secure needed goods or services other than by acceding to the promisee’s new demands.²⁰³ In particular, courts look to whether the acquiescing party could have replaced the would-be breaching party by obtaining the promised performance through other means and recouping its losses through later litigation. In effect, the question is whether the party accepting the modification had an opportunity to “cover.”²⁰⁴

Austin Instrument, Inc. v. Loral Corp., a 1971 New York Court of Appeals decision, provides an example.²⁰⁵ In that case, the parties were a government contractor engaged to build military radars, and the subcontractor supplying specialized gears for the radars.²⁰⁶ As a result of rising material costs, Austin, the subcontractor, threatened to discontinue performance if it did not receive several additional subcontracts as well as retroactive price increases on gears already promised or provided.²⁰⁷ Loral, the government

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *See id.* This is, of course, one interpretation from among many. For other readings of *Roth Steel*, see Johnston, *supra* note 185, at 379–90 (reading the second prong of the *Roth Steel* test as requiring an assessment of the promisee’s motive consistent with the foregone benefit approach to good faith); Snyder, *supra* note 160, at 676 (suggesting that the *Roth Steel* test, influenced by the doctrine of duress, tolerates some coercive modifications and arguing for an alternative test focused directly on coercion).

²⁰² *See* 7-28 CORBIN, *supra* note 12, § 28.2.

²⁰³ *See Austin Instrument, Inc. v. Loral Corp.*, 272 N.E.2d 533, 535 (N.Y. 1971); RESTATEMENT (SECOND) OF CONTRACTS § 175; Meredith R. Miller, *Revisiting Austin v. Loral: A Study in Economic Duress, Contract Modification and Framing*, 2 HASTINGS BUS. L.J. 357, 358–61 (2006) (discussing the doctrine).

²⁰⁴ “Cover” refers to a buyer’s right to purchase replacement goods following breach by a seller. *See* U.C.C. § 2-712.

²⁰⁵ 272 N.E.2d 533.

²⁰⁶ *Id.* at 534.

²⁰⁷ *Id.* at 535.

contractor, was obligated to provide the radars to the military under stringent time constraints subject to liquidated damages and cancellation clauses.²⁰⁸ After contacting its other approved suppliers, none of whom could guarantee performance within its timeframe, Austin agreed to Loral's demands.²⁰⁹ In the subsequent dispute over the enforceability of the modification, the New York Court of Appeals held that Loral's concession was extracted by duress.²¹⁰ Central to the court's holding was Loral's inability to find timely replacement gears and the consequences of a possible default. It noted that none of the replacement suppliers Loral contacted could guarantee timely delivery and that, because Loral was producing a highly specialized military product, it would have been extremely risky to consider other non-approved vendors.²¹¹

This is not to suggest that the law of modification is coextensive with the rule of duress.²¹² The point simply is that, whatever doctrine one applies, the contemporary law of modifications is about coercion, not consideration. The common law continues to assume modifications without consideration are unenforceable, but it allows an increasingly broad array of exceptions based on fairness and unforeseen circumstances. The UCC inverts the PELDR altogether. The Code assumes modifications are enforceable, provided they are objectively justified and honestly obtained.

III. A CONTRACT LAW APPROACH TO MID-TERM MODIFICATIONS: THE REASONABLE NOTICE RULE

The previous Part describes the contemporary approach to the enforcement of contract modifications in mainstream contract law, which emphasizes good faith and voluntariness. This Part reexamines mid-term modi-

²⁰⁸ *Id.* at 534.

²⁰⁹ *Id.* at 535.

²¹⁰ *Id.* at 536.

²¹¹ *Id.* at 537. See generally Miller, *supra* note 203 (providing an extensive reconsideration of the *Austin* decision).

²¹² Duress sets an extremely high bar for voiding a contract to which parties objectively appear to have agreed. See generally Grace M. Giesel, *A Realistic Proposal for the Contract Duress Doctrine*, 107 W. VA. L. REV. 443 (2005) (discussing courts' limited application of the doctrine of duress). Commentators differ on whether the common law duress defense, which survives the codification of commercial law, ought to replace the good faith modification standard, or whether the two doctrines have independent purposes. Compare Steven J. Burton, *Good Faith Performance of a Contract Within Article 2 of the Uniform Commercial Code*, 67 IOWA L. REV. 1, 19–20 (1981) (discussing whether contract modifications should be “framed . . . in terms of good faith . . . [or] in terms of duress”), and Hillman, *supra* note 155, at 879 (arguing that contract modifications should be analyzed under the doctrine of duress), with Johnston, *supra* note 185, at 377–78 (arguing “the opposite view” of Professor Hillman, that duress doctrine is ill suited to analyze modifications), and Snyder, *supra* note 160, at 674–77 (asserting that “the duress standard is too restrictive when applied to a modification”).

fication jurisprudence through this lens. It argues that a reasonable notice rule, similar to that adopted by the California Supreme Court in the context of handbook modifications, should apply to all mid-term modifications of at-will employment. Section A argues that such a rule reflects the process concerns that underlie the notion of good faith modification by constraining employers' ability to threaten immediate termination while retaining the basic principles of employment at will.²¹³ Section B argues that reasonable notice also serves as the consideration required under traditional common law modification analysis.²¹⁴ The proposed rule is therefore consistent with both the theory and doctrine of mainstream contract modification law.

A. Reasonable Notice as Contractual Good Faith

Mid-term modification jurisprudence, examined through the lens of contemporary contract law, appears starkly retrograde. Contrary to the UCC's interdiction against overly technical applications of the consideration doctrine, mid-term modification law is highly formalistic. Either consideration is satisfied because the employer hypothetically forbore from exercising its right to terminate, or it is satisfied because the employer provided some independent, but often employment-dependent, benefit. In this way, both mid-term modification approaches are reminiscent of the early common law workarounds of the traditional PELDR.²¹⁵ The unilateral approach is the equivalent of the traditional "rescission/new contract" exception, under which parties were deemed to have released one another from their original contract and formed a new one under new terms.²¹⁶ The formal approach replicates the "nominal benefit" exception under which courts seize on any identifiable change in the performance of the promisee to justify a conclusion that new consideration was supplied.²¹⁷

What courts have failed to do in analyzing mid-term modifications is to consider whether a particular modification is consistent with the contemporary doctrine of contractual good faith. What a "good faith" modification looks like is far from obvious when that concept is imported to the employment context. Employers are free to hire on whatever terms they wish and terminate workers for any or no reason. Indeed, contemporary justifications for employment at will rest in large part on the need for significant deference to termination decisions given the costs of judicial assessment of

²¹³ See *infra* notes 215–262 and accompanying text.

²¹⁴ See *infra* notes 263–295 and accompanying text.

²¹⁵ See *supra* notes 148–159 and accompanying text.

²¹⁶ See *supra* notes 148–159 and accompanying text.

²¹⁷ See *supra* notes 148–159 and accompanying text.

employer discretion.²¹⁸ Allowing courts to assess employers' rationale for modifying terms, consistent with good faith's commercial reasonableness test, would be incompatible with these principles.

Employment at will, however, does not preclude judicial inquiry into the manner in which a modification is obtained. This second prong of the UCC test can support an employment law reading of good faith that requires reasonable advance notice of mid-term modifications. Such a rule strikes a balance between preserving flexibility and preventing coercion by ensuring that the employee has an opportunity to consider alternatives before acquiescing to the modification. Subsection 1 redefines the duty of good faith in employment law as a procedural obligation.²¹⁹ Subsection 2 demonstrates how a reasonable notice rule fulfills employers' duty of procedural good faith in the mid-term modification context.²²⁰

1. Redefining Good Faith in Continuing Employment Relationships

Claims sounding in good faith have had little traction in the employment context. Courts historically have expressed concern that any constraint on employer discretion, even one tied to bad faith behavior, violates the doctrine of employment at will. *Murphy v. American Home Products Corp.*, a 1983 decision of the New York Court of Appeals, illustrates this view.²²¹ In that case, the court rejected a claim by an accountant allegedly fired for reporting financial mismanagement.²²² Although the court acknowledged the existence of the implied duty of good faith as a general matter, it held that the application of the duty must be limited by "other terms of the [employment] agreement."²²³ Noting that the law accorded the employer "an unfettered right to terminate the employment at any time," the court asserted, "it would be incongruous to say that an inference may be drawn that the employer impliedly agreed to a provision which would be destructive of his right of termination."²²⁴

²¹⁸ See, e.g., Richard A. Epstein, *In Defense of the Contract At Will*, 51 U. CHI. L. REV. 947 (1984); Edward B. Rock & Michael L. Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913 (1996). For further discussion of this position and the economic defense of employment at will more generally, see Arnow-Richman, *Just Cause to Just Notice*, *supra* note 26.

²¹⁹ See *infra* notes 221–248 and accompanying text.

²²⁰ See *infra* notes 249–262 and accompanying text.

²²¹ 448 N.E.2d 86, 87 (N.Y. 1983).

²²² *Id.*

²²³ *Id.* at 91.

²²⁴ *Id.*; see also *Gomez v. Trs. of Harvard Univ.*, 676 F. Supp. 13, 15 (D.D.C. 1987) (rejecting the applicability of good faith to at-will employment relationships); *Cramer v. Fairfield Med. Ctr.*, 914 N.E.2d 447, 455 (Ohio Ct. App. 2009) (same). See generally James J. Brudney, *Reluctance and Remorse: The Covenant of Good Faith and Fair Dealing in American Employment Law*, 32 COMP. LAB. L. & POL'Y J. 773 (2011) (discussing how the absence of regulation ensuring fair

Other jurisdictions have been less hostile to employee good faith claims than New York. But even those that accept such claims, have done so only in narrow circumstances involving the employer's failure to pay deferred compensation.²²⁵ This limited reading has been endorsed by the *Restatement of Employment Law*, notwithstanding scholarly criticism,²²⁶ and it appears that no court has adopted the broad definitions of good faith espoused by the *Restatement (Second) of Contracts* and UCC in the context of employment at will.²²⁷

Even so, it would be premature to write off the duty of good faith in employment altogether. *Murphy* and most other employment law cases addressing good faith do so in the context of termination rather than modifica-

termination in employment law constrains courts in applying the duty of good faith in at-will employment contracts).

²²⁵ See, e.g., *Fortune v. Nat'l Cash Register Co.*, 364 N.E.2d 1251, 1257 (Mass. 1977) (permitting cause of action for recovery of lost commissions where employee was terminated following consummation of sale but prior to full accrual under employer's policy); *Phillips v. U.S. Bank*, 781 N.W.2d 540, 544-45 (Wis. Ct. App. 2010) (holding that bank violated contractual good faith requirement by terminating its employee in order to deprive her of payment that had accrued before her termination); cf. *Metcalf v. Intermountain Gas Co.*, 778 P.2d 744, 750 (Idaho 1989) ("[W]ithout tying the violation of the covenant to the 'amorphous concept of bad faith,' we conclude that any action by either party which violates, nullifies or significantly impairs any benefit of the employment contract is a violation of the implied-in-law covenant of good faith and fair dealing" (quoting *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025 (Ariz. 1985))). The facts of such cases hew closely to the narrow "forgone benefit" approach to good faith advanced by Professor Steven Burton rather than the broader definition espoused by the UCC and *Restatement of Contracts*. See Burton, *supra* note 183, at 400-01 (citing *Fortune*, 364 N.E.2d 1251, as an example of the proper scope of the duty of good faith consistent with his "forgone benefits" theory of the duty).

²²⁶ See RESTATEMENT OF EMP'T LAW § 2.07 (AM. LAW INST. 2015) ("The implied duty of good faith and fair dealing applies to at-will employment relationships [It] includes the duty not to terminate or seek to terminate the employment relationship for the purpose of . . . preventing the vesting or accrual of an employee right or benefit . . ."). For a critique of this position, see Finkin et al., *supra* note 115, at 138-41 (challenging the drafters of the *Restatement* to justify their departure from the application of good faith in mainstream contract law).

²²⁷ Cf. U.C.C. § 1-201(20) (AM. LAW INST. & NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAW 2015); RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (AM. LAW INST. 1981); *supra* notes 178-212 and accompanying text. *But see* Finkin et al., *supra* note 115, at 138-41 (suggesting that the law of some jurisdictions, including Delaware and Alaska, can support a broader reading of the doctrine in employment). This limited understanding of good faith in employment has led to pessimism among some employment law scholars as to the utility of the covenant in the at-will context. See Brudney, *supra* note 224, at 807-08 (concluding that entrenched notions of employment at will are likely to continue deterring courts from applying the duty of good faith broadly to terminations); Monique C. Lillard, *Fifty Jurisdictions in Search of a Standard: The Covenant of Good Faith and Fair Dealing in the Employment Context*, 57 MO. L. REV. 1233, 1233-34 (1992) (suggesting abandoning the concept of good faith in favor of other theories of wrongful discharge). Others persist in pushing for a more expansive reading, albeit without success. See, e.g., J. Wilson Parker, *At-Will Employment and the Common Law: A Modest Proposal to De-Marginalize Employment Law*, 81 IOWA L. REV. 347, 371-76 (1995); Henry H. Perritt, Jr., *Implied Covenant: Anachronism or Augur?*, 20 SETON HALL L. REV. 683, 684-87 (1990).

tion, and it is by no means clear that the same standard ought to apply.²²⁸ Good faith arises from and endures only as long as the parties' contract, and it is arguably in the course of their relationship that the duty does most of its work. In the commercial context, the defense of bad faith modification is a distinct doctrine separate and apart from the general breach of good faith duty claim. Indeed it is during renegotiation that parties are most likely to rely on relational norms like trust and fair dealing²²⁹—contexts and expectations that may not be well reflected in existing case law.²³⁰ When such matters are litigated, as with mid-term modifications, it may make sense to apply a broader understanding of good faith than would be applicable in assessing an alleged breach of performance.

Moreover, the inconsistency between employment at will and the duty of good faith arises primarily where the latter doctrine is equated with a substantive limitation on employer discretion—in *Murphy*, a limitation on the allowable reasons for termination. But good faith in employment can also be understood as a procedural obligation, one that requires employers to act fairly in carrying out discretionary modifications that are otherwise immune from substantive review.²³¹

A reasonable notice rule, similar to that adopted in the handbook cases, embodies that obligation. To be sure, no court has yet tied the unilateral modification plus notice approach to principles of good faith,²³² and there

²²⁸ Scholars have recognized the many different and distinct roles good faith plays in interpreting and enforcing contracts in elaborating on the doctrine's meaning. See, e.g., E. Allan Farnsworth, *Good Faith in Contract Performance*, in GOOD FAITH AND FAULT IN CONTRACT LAW 153, 163 (Jack Beatson & Daniel Friedmann eds., 1995) (noting that good faith can be used to limit the exercise of contractually conferred discretion, to proscribe behavior that violates community standards of decency, or as a means of implying a term to fill a gap in the parties' contract).

²²⁹ See Macneil, *supra* note 13, at 874 (suggesting that, for long-term relationships, the "reference point" for understanding the legitimacy and appropriateness of contractual adjustments, must be "the entire relation as it had developed to the time of the change in question"); David A. Hoffman & Tess Wilkinson-Ryan, *The Psychology of Contract Precautions*, 80 U. CHI. L. REV. 395, 422–25 (2013) (demonstrating that parties are more likely to eschew contractual precautions and rely on interpersonal trust once a contract has formed than during the contract formation process).

²³⁰ See Paul MacMahon, *Good Faith and Fair Dealing as an Underenforced Legal Norm*, 99 MINN. L. REV. 2051, 2054–57 (2015) (suggesting that good faith operates in practice as a "rule of conduct" requiring reasonable behavior between contracting parties and conformity with industry norms notwithstanding its more limited application by courts in the context of litigated claims of breach).

²³¹ See *Charles v. Interior Regional Hous. Auth.*, 55 P.3d 57, 62 (Alaska 2002) (suggesting that the "objective aspect" of the covenant of good faith requires an employer to "act in a manner that a reasonable person would regard as fair" (emphasis added)). This understanding of the duty of good faith in employment, seemingly unique to Alaska, is discussed in greater detail *infra* notes 249–262 and accompanying text.

²³² The unilateral modification plus notice cases offer no coherent explanation for why notice is required; indeed that obligation is at odds with those courts' characterization of employment as a unilateral contract. See Apps, *supra* note 105, at 915 (noting this inconsistency). The closest that

has been little scholarship exploring the connection.²³³ Yet, the doctrine and policy behind contemporary modification law appear to supply a ready foundation for the rule, as well as a basis for extending it to other mid-term modifications. Reasonable notice effectuates the goals of the second prong of the UCC modification test by policing the way in which employers secure assent to their proposed modification. Irrespective of employment at will, an employer's threat of immediate termination is a distinct form of pressure that derives its power from the existing and, from the employee's perspective, exclusive contractual relationship.²³⁴ Finding alternate employment takes time, and the best way to finance a job search is to remain employed.²³⁵

has been offered is an analogy to administrative agencies, which have the authority to issue and revise rules at their election subject to a notice and comment period. *See Demasse v. ITT Corp.*, 984 P.2d 1138, 1158 (Ariz. 1999) (en banc) (Jones, J., concurring in part and dissenting in part) (quoting HENRY H. PERRITT, JR., *EMPLOYEE DISMISSAL LAW & PRACTICE* § 4.44 (3d ed. 1992)). As previously discussed, the *Restatement of Employment* drafters cite this analogy with approval. *See RESTATEMENT OF EMP'T LAW* § 2.05 cmt. b; *supra* notes 104–133 and accompanying text. Interestingly, these courts and commentators consider only the notice aspect of the administrative process in drawing this analogy. None suggest that employees ought to have a formal process through which to protest or influence the content of the employer's proposed changes consistent with the administrative comment process.

²³³ The key exception is *Apps*, *supra* note 105, at 916–20, which explores the use of the good faith doctrine to support the handbook notice rule by reference to the comparable, but more expansive requirement, of “mutual trust and confidence” under English law. *Cf.* Slawson, *supra* note 105, at 23 (critiquing the unilateral modification plus notice approach, but asserting that the duty of good faith would limit an employer's discretion to modify its handbooks and policies under any provision expressly reserving that right).

²³⁴ *See Kadis v. Britt*, 29 S.E.2d 543, 548 (N.C. 1944) (remarking that “[u]nemployment at a future time is disturbing—its immediacy is formidable” in rejecting unilateral modification approach to enforceability of mid-term noncompete).

²³⁵ It is unclear whether an employee terminated for refusing to accept a mid-term modification could receive unemployment insurance. Employees may not receive compensation during unemployment resulting from a voluntary termination or termination for misconduct, including refusing work orders. *See, e.g., Doby v. Okla. Emp't Sec. Comm'n*, 823 P.2d 390, 392–93 (Okla. Civ. App. 1991) (holding that employee who refused to take a drug test was terminated for misconduct and thus was not entitled to unemployment compensation benefits). At least some states will allow benefits to an employee terminated for refusing to accept unlawful or unreasonable terms of employment. *See, e.g., Tourte v. Oriole of Naples, Inc.*, 696 So. 2d 1283, 1284–86 (Fla. Dist. Ct. App. 1997) (holding that former employee who voluntarily resigned because her employer required her to leave her secretarial position for a more “stressful” sales position was entitled to unemployment compensation benefits); *Indianapolis Osteopathic Hosp., Inc. v. Jones*, 669 N.E.2d 431, 432–35 (Ind. Ct. App. 1996) (holding that former employee who voluntarily resigned following employer insistence that she change shifts to one during which she had no child care was entitled to unemployment compensation benefits). Regardless, unemployment insurance is a weak substitute for continued employment. Most workers receive approximately half of their weekly earnings, subject to a state-imposed cap. *See* Samuel Estreicher & Jeffrey M. Hirsch, *Comparative Wrongful Dismissal Law: Reassessing American Exceptionalism*, 92 N.C. L. REV. 343, 444 (2014) (broadly describing U.S. unemployment system); Frans Pennings & Paul M. Secunda, *Towards the Development of Governance Principles for the Administration of Social Protection Benefits: Comparative Lessons from Dutch and American Experiences*, 16 MARQ. BENEFITS & SOC. WELFARE L. REV. 313, 331–33 (2015) (examining Wisconsin's unemployment system). In addition,

The employer who requires a worker to accept a mid-term modification on penalty of immediate termination capitalizes on that reality, effectively preventing the employee from meaningfully evaluating the new terms by “shopping around” prior to acceptance.

In this way, the reasonable notice rule also reflects one of the core components of the economic duress doctrine. The modern version of the doctrine will void a contract where the promisee secures assent through an “improper threat . . . that leaves the [promisor] no reasonable alternative.”²³⁶ In the context of modification, an “alternative” refers to an available source of the goods or services owed under the pre-existing contract.²³⁷ Assent is deemed lacking in those cases where, due to the circumstances or the urgency of the promisee’s modification demand, the promisor is unable to find a replacement supplier.²³⁸ In the employment context, the equivalent supplier is a new employer, and the ability to find one hinges on the employee’s receipt of sufficient advance notice.

some evidence suggests that it is more difficult to find new work while unemployed than while holding a job. See generally Winnie Hu, *When Being Jobless Is a Barrier to Finding a Job*, N.Y. TIMES (Feb. 17, 2013), <http://www.nytimes.com/2013/02/18/nyregion/for-many-being-out-of-work-is-chief-obstacle-to-finding-it.html> [<http://perma.cc/K4YH-T9LL>] (discussing long-term unemployment’s effect on job applicants and state legislative efforts to prevent discrimination of unemployed); Jennifer Peltz, *NYC Adopts Tough Jobless-Discrimination Law*, SEATTLE TIMES (Mar. 13, 2013), <http://www.seattletimes.com/nation-world/nyc-adopts-tough-jobless-discrimination-law/> [<https://perma.cc/AUZ7-L3M7>] (discussing New York City’s new law banning discrimination of unemployed); Brad Plumer, *Companies Won’t Even Look at Resumes of the Long-Term Unemployed*, WASH. POST (Apr. 15, 2013), <https://www.washingtonpost.com/news/work/wp/2013/04/15/companies-wont-even-look-at-resumes-of-the-long-term-unemployed/> [<https://perma.cc/UAQ9-WNN2>] (discussing reasons for and possible solutions to companies’ aversion to hiring candidates who are unemployed); Megan Woolhouse, *Project Aims to Assist Long-Term Unemployed: MIT Professor Launching Effort to Help Them Overcome Barriers*, BOS. GLOBE (Nov. 17, 2013), <https://www.bostonglobe.com/business/2013/11/17/the-science-rejection-helping-long-term-unemployed/sZRflqC77cyYQ2ZZNcgv7L/story.html> [<http://perma.cc/W8Y6-4WUT>] (discussing study that found employers showed four times more interest in candidates experiencing short-term rather than long-term unemployment, even if the former had less experience and fewer qualifications).

²³⁶ See RESTATEMENT (SECOND) OF CONTRACTS § 175.

²³⁷ See, e.g., *Austin Instrument, Inc. v. Loral Corp.*, 272 N.E.2d 533 (N.Y. 1971); *supra* notes 178–212 and accompanying text.

²³⁸ A similar rationale underlies the UCC’s rule requiring reasonable advance notice of contract termination. See U.C.C. § 2-309 cmt. 8 (recognizing that “the application of principles of good faith and sound commercial practice normally call for such notification of the termination of a going contract relationship as will give the other party reasonable time to seek a substitute arrangement”); *Pharo Distrib. v. Stahl*, 782 S.W.2d 635, 638–38 (Ky. Ct. App. 1989) (finding breach of contract because distributor’s provision of only six days’ notice of termination deprived the sub-distributor of “an opportunity to make appropriate arrangement[s],” such as finding a replacement supplier, unloading inventory, and making workforce adjustments). In a previous work, the author discusses this law in greater detail, proposing an analogous interpretation of employment law that would require reasonable advance notice of at-will termination. See Arnow-Richman, *Mainstreaming Employment Contract Law*, *supra* note 25, at 1545–48.

To be sure, this is not a precise analogy. Employers have no underlying contractual obligation to retain workers employed at will. Hence, a threat of termination, regardless of its form, does not herald the breach of a legal duty.²³⁹ Yet, the threat of breach standard is merely an elaboration on the requirement that the promisee's conduct be wrongful, and one of limited utility in the modification context.²⁴⁰ All modification demands are implicit or explicit threats not to perform a binding obligation;²⁴¹ at the same time, a modification demand may be coercive even if it does not endanger pre-existing legal rights.²⁴² The question is how and under what circumstances the demand is made. Although the law inclines naturally toward legal baselines,²⁴³ other means of assessing coercion are possible and appropriate.²⁴⁴ Thus, it has been suggested in the philosophical literature that a proposal may be coercive notwithstanding its legality where the offeror limits or undermines the offeree's freedom to create or pursue a more desirable situation.²⁴⁵ Such conduct distinguishes offers that merely exploit an offeree

²³⁹ See Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 122–24 (1996) (explaining how an employer's freedom to determine who to hire and whether to fire precludes application of the duress defense to employment arbitration agreements regardless of when the employee consented).

²⁴⁰ Indeed the meaning of "wrongful" or "improper" for purposes of establishing the general defense of duress has been equally if not more contested. Compare Giesel, *supra* note 212, at 448 (emphasizing the lack of reasonable alternatives available to the promisor over the wrongfulness of the threat), with Oren Bar-Gill & Omri Ben-Shahar, *Credible Coercion*, 83 TEX. L. REV. 717, 718–20 (2005) (eschewing classic duress formulation in favor of enforcing contracts formed under a credible, rather than strategic, threat in order to preserve promisor's ability to make a binding commitment to its choice of last resort). The *Restatement* offers a catalogue of circumstances under which a threat should be deemed "improper" for purposes of duress. See RESTATEMENT (SECOND) OF CONTRACTS § 176.

²⁴¹ See Hamish Stewart, *A Formal Approach to Contractual Duress*, 47 U. TORONTO L.J. 175, 198 (1997) ("[A]ny proposal to modify an existing contract could be construed as a threat of breach, but that would be a highly undesirable result . . .").

²⁴² *Id.* at 183–85 (describing scenarios in which a proposal is not wrongful in the legal sense, but it appears that the promisor should be relieved of his or her promise due to business compulsion).

²⁴³ See Snyder, *supra* note 160, at 679 (asserting that such baselines are "within the competence of the law" in proposing a coercion-based UCC modification test that turns on the presence of a threat to deprive the victim of a legal right); Stewart, *supra* note 241, at 237–38 (rejecting "empirical theories" of coercion in favor of a legal baseline in proposing a narrow, formal account of duress that does not "depend on factors extrinsic to law itself").

²⁴⁴ See ALAN WERTHEIMER, COERCION 204–21 (1987) (discussing various moral and non-moral baselines for determining whether an offer is coercive).

²⁴⁵ See David Zimmerman, *Coercive Wage Offers*, 10 PHIL. & PUB. AFF. 121, 133–34 (1981). Zimmerman uses the example of an employer who kidnaps and abandons a worker on a desert island where it is the only employer and then offers employment at a subsistence wage. *Id.*; cf. Giesel, *supra* note 212, at 492 ("Setting aside a contract on the basis of duress is just and justifiable when one party has no reasonable alternative to the problematic bargain and when the other party has been proven to be particularly blameworthy regarding the constrained nature of the deal.").

whose limited options owe to independent or pre-existing circumstances.²⁴⁶ This framework describes precisely the situation of the at-will employee presented with a mid-term modification. The employee's poor bargaining position owes principally to the dominant rule of employment at will, but the employer's choice to present the modification on penalty of immediate termination exacerbates the pre-existing power imbalance.²⁴⁷ Having received no advance warning, the employee must accept the new terms without any realistic opportunity to better his or her bargaining position by seeking an alternative offer.

In sum, a reasonable notice requirement operates to separate wrongfully exacted modifications from legitimate ones by ensuring a period of time between the announcement of a modification and its implementation. It removes the threat of an immediate loss of income, which would otherwise force employee acquiescence. More importantly, it guarantees the employee a period of time in which he or she can rely on the old terms and consider alternatives.²⁴⁸ Rather than having to unconditionally accept the modification, the employee has an opportunity to compose his or her response, whether it is an attempt at negotiation, an adjustment in expectations, or a decision to seek a "replacement supplier" in the form of a new employer.

2. Achieving Good Faith Employment Modifications Through Reasonable Notice

The proposed theory of procedural good faith has yet to be explicitly adopted by courts, but there is at least some case law demonstrating its potential applicability. The Alaska Supreme Court has drawn the connection between good faith and advance notice of mid-term modifications in the context of an employer drug testing policy. *Luedtke v. Nabors Alaska Drilling Inc.*, a case heard in the Alaska State Supreme Court in both 1989 (*Luedtke I*) and 1992 (*Luedtke II*), involved a drilling rig worker who was

²⁴⁶ See Zimmerman, *supra* note 245, at 133–34. Zimmerman distinguishes an offer from a second island employer who has no part in confining the worker to the island but offers a similarly depressed wage, labeling this offer exploitive rather than coercive. *Id.*

²⁴⁷ In this way, this Article distinguishes its proposal from those that would set aside contracts in recognition of limited volitional capacity resulting from particular societal inequities. See, e.g., Orit Gan, *Contractual Duress and Relations of Power*, 36 HARV. J.L. & GENDER 171, 198 (2013) (calling for a broader duress doctrine that takes account of existing power imbalances between the parties in the context of spousal agreements).

²⁴⁸ Because of the advance notice requirement, one would anticipate that in most cases the employee would not be subjected to discharge for refusing to accept a mid-term modification until the date of implementation. It might be necessary, however, to recognize a cause of action for breach of the duty of good faith where the employer anticipatorily terminates the worker for an expected refusal to acquiesce. Of course, the employer would remain free to terminate for other reasons during the notice period consistent with employment at will.

suspended for testing positive for marijuana and terminated when he failed to appear for a retest.²⁴⁹ In its first decision, the court found nothing unlawful in the employee's termination, concluding that the employer's interest in safety outweighed the employee's interest in privacy.²⁵⁰ In the second decision, however, it held that the employer's initial suspension of the employee violated the duty of good faith because the employer had failed to provide the worker with advance notice of its drug testing policy.²⁵¹ Analogizing to the UCC, the court explained that the duty of good faith not only has substantive content, but also requires that the employer act in "a manner which a reasonable person would regard as fair."²⁵²

In many ways, *Luedtke II* is an outlier, sounding principally in privacy law and the public policy tort.²⁵³ It appears that the procedural limitations the court imposes on employer discretion owe more to the bodily integrity issues implicated in drug testing than to the court's understanding of the contract rights of the employee.²⁵⁴ Yet, the connection the court draws between notice and the duty of good faith is informative. In adopting a reasonable notice requirement, the court explains:

We agree that there is no evidence of subjective bad faith on Nabors' part, but . . . the covenant of good faith and fair dealing also requires that the employer be objectively fair. . . . As we stated in *Luedtke I*: . . . "[b]y requiring a test, an employer introduces an additional term of employment. An employee should have notice of the additional term so that he may contest it, refuse to accept it and quit, seek to negotiate its conditions, or prepare for the test so that he will not fail it and thereby suffer sanctions."²⁵⁵

In short, the court invoked all of the hallmarks of a modification achieved in good faith under the procedural prong of the mainstream contract rule.

The handbook modification cases adopting a reasonable notice rule similarly provide guidance as to how a procedural good faith rule might operate. *Asmus v. Pacific Bell*, the key California Supreme Court decision from 2000, does not invoke the duty of good faith in its analysis, but the

²⁴⁹ *Luedtke v. Nabors Alaska Drilling, Inc. (Luedtke II)*, 834 P.2d 1220 (Alaska 1992).

²⁵⁰ *Luedtke v. Nabors Alaska Drilling, Inc. (Luedtke I)*, 768 P.2d 1123, 1130 (Alaska 1989).

²⁵¹ *Luedtke II*, 834 P.2d at 1222, 1226.

²⁵² *Id.* at 1224.

²⁵³ *See id.* In Alaska, the prohibition against terminations that violate public policy, a free-standing tort in most jurisdictions, is "largely encompassed within the implied covenant of good faith and fair dealing." *Knight v. Am. Guard & Alert, Inc.*, 714 P.2d 788, 792 (Alaska 1986).

²⁵⁴ *Luedtke I* extensively discussed various sources of state law protection for individual privacy, concluding that the employer's safety-based interest in drug testing had to be balanced against the employees' rights. *See Luedtke I*, 768 P.2d at 1131-37.

²⁵⁵ *Luedtke II*, 834 P.2d at 1225-26 (quoting *Luedtke I*, 768 P.2d at 1137 (footnote omitted)).

facts of the case offer a clear illustration of procedural fairness consistent with such principles.²⁵⁶ There the employer took a series of steps leading up to the cancelation of its disputed management security policy. The original MESP included a disclaimer, cautioning managers that it would be maintained only so long as market conditions permitted.²⁵⁷ Four years after it issued the MESP, Pacific Bell sent a letter to managers stating that it was monitoring market conditions and might be forced to change the policy.²⁵⁸ Two years later the company announced that it would terminate the MESP, but that the change would occur in six months.²⁵⁹ Thus, when the employer ultimately did change its policy, employees had known for six years that it could happen, for two years that it might happen, and for six months that it actually would.

To be clear, the point here is not to endorse the particular result in *Asmus*.²⁶⁰ Nor is it to suggest that every policy change should necessitate six years' notice, or even six months' notice.²⁶¹ Rather it is to demonstrate the potential for a robust reasonable notice rule that can ameliorate somewhat the employee's untenable position of having to choose between accepting a modification or facing immediate termination.²⁶² A reasonable notice requirement advances the policies behind contemporary modification law and in some cases will better serve workers that a formal modification approach

²⁵⁶ *Asmus v. Pacific Bell*, 999 P.2d 71, 73 (Cal. 2000).

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 73–74.

²⁶⁰ As previously discussed, the MESP at issue in the case provided that it would terminate only upon a material change in economic conditions. *Id.* at 73. Thus it appears that management intended the policy to be non-modifiable absent such a condition, in which case the court ought to have enforced the policy as written. *See id.* at 85 (George, C.J., dissenting) (“When an employment contract specifies that the employer’s obligations will be terminated upon the occurrence of a future event, the employer is bound by the contract unless and until the event occurs . . .”); *supra* notes 104–133 and accompanying text.

²⁶¹ This Article takes up the question of the proper notice period *infra* notes 300–315 and accompanying text.

²⁶² On this point this Article diverges significantly from the *Restatement of Employment Law*'s endorsement of the reasonable notice rule. The *Restatement* comments state that

[o]rdinarily, the reasonableness standard is met when the notice is given in the same or substantially the same way the original statement was provided or made accessible. The ultimate question is whether the employer provided notice that was reasonably calculated to alert employees to any modification or rescission of material terms in prior policy statements.

RESTATEMENT OF EMP'T LAW § 2.06 cmt. d. This suggests that the role of notice is merely to inform and that notice is effective if it achieves this purpose irrespective of how far in advance it is given. Such an interpretation is inconsistent with the contract modification notion of good faith previously discussed, as well as with the decided cases on which the *Restatement* drafters rely. The facts in *Asmus* strongly suggest that the California court expects an employer to do more than simply alert employees as to the policy change. *See Asmus*, 999 P.2d at 73–75.

which requires only a modest and employment-dependent consideration. Moreover, the rule accomplishes this in a way that is reasonably consistent both with employment at will and mainstream contract law.

B. Reasonable Notice as Common Law Consideration

The previous section argues that applying a reasonable notice rule to mid-term modifications better advances the policies underlying contemporary contract modification law by ensuring a modicum of voluntariness in employees' assent to proposed modifications, albeit within the constraints of employment at will. At the same time, a reasonable notice approach can satisfy the technical requirements of traditional common law to the extent they still exist. Although commentators have criticized the PELDR and courts strive to avoid its application,²⁶³ the requirement of consideration absent unforeseen circumstances remains the black letter rule for common law contract modifications.²⁶⁴ That reality, however, does not defeat the doctrinal legitimacy of a reasonable notice approach to mid-term modifications. Rather reasonable notice can itself provide the requisite consideration for employee agreement. Thus, although the principal contention of this Article is that mid-term modification law should advance principles of good faith rather than cleave to the doctrine of consideration, a reasonable notice rule actually does both.

Courts' struggles over the meaning of consideration in the mid-term modification context are reflective of a larger, long-standing problem in employment law. Because the employment-at-will relationship is of indefinite duration, and both parties retain discretion to terminate, courts have often described the arrangement as an illusory contract.²⁶⁵ Basic principles of consideration require a commitment on the part of one party in exchange for the promise or performance of the other.²⁶⁶ A promisor who retains absolute discretion to perform has made no commitment, and therefore provided nothing of value, that will bind the opposing party.

For years courts have squared the seeming inconsistency between the at-will nature of employment and the formal requirement of consideration

²⁶³ 2-7 CORBIN, *supra* note 12, § 7.1 (describing the rule as “destined to be overturned” and noting that some courts have “refused to apply the rule, or ignored it” altogether).

²⁶⁴ See RESTATEMENT (SECOND) OF CONTRACTS § 73 (“Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration.”); *supra* notes 148–162 and accompanying text.

²⁶⁵ See Lord, *supra* note 15, at 714 (“Because the traditional rule allows either party to an at-will relationship to put an end to it at any time, a promise by either the employer or the employee to continue an existing at-will relationship is by its nature illusory.”).

²⁶⁶ See RESTATEMENT (SECOND) OF CONTRACTS § 71.

through appeals to unilateral contract theory.²⁶⁷ A unilateral contract involves only one promise made with the intention of eliciting a discretionary performance by the promisee.²⁶⁸ There is no need for consideration in such a contract, or better stated, consideration is supplied, and a contract formed, only if and when the discretionary performance is rendered. Thus, in the case of employment, courts have theorized that the employer's offer to employ, and more specifically to compensate, the worker under specified terms is an offer for a unilateral contract that binds the employer if the employee chooses to work.²⁶⁹ As classically formulated, this analysis leaves both parties free to terminate, or more accurately, to revoke—the employer can revoke any time prior to receiving the agreed upon performance, and the employee was never bound to begin with.

This model rests on an artificially discrete notion of the employment contract, one that is ill equipped to account for the larger relational context beyond the bare exchange of wages for work.²⁷⁰ In reality, parties to an employment relationship often make many promises, implicit and explicit, from which they reasonably develop expectations about the future.²⁷¹ More importantly, they often make or solicit written promises with the intention that they be prospectively binding both at the outset and during the course of their relationship.²⁷² Such commitments belie the notion that employment is unilateral. An employee who has restricted his ability to compete post-employment is hardly in the position of the hypothetical offeree who, in entertaining an offer for a unilateral contract, is free to perform or not. To

²⁶⁷ 2-6 CORBIN, *supra* note 12, § 6.2. The recognition of employee handbooks as contractual documents has cemented this view. See Pettit, *supra* note 134, at 551–52 (discussing courts' appeal to unilateral contract theory in enforcing employer handbooks).

²⁶⁸ 2-6 CORBIN, *supra* note 12, § 6.2.

²⁶⁹ See, e.g., *Asmus*, 999 P.2d at 81 (describing a company's management security policy as an "implied in-fact unilateral contract," the modification of which was accepted by employees via their continued employment); *Torosyan v. Boehringer Ingelheim Pharm., Inc.*, 662 A.2d 89, 96 (Conn. 1995) ("To determine the contents of any particular implied contract of employment, the factual circumstances of the parties' relationship must be examined in light of legal rules governing unilateral contracts."); *Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 630 (Minn. 1983) (describing employer's personnel manual as an "offer of a unilateral contract" that the employee accepted through "continued performance of his duties despite his freedom to quit"); *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1267 (N.J.) (describing an employer's personnel manual as "an offer that seeks the formation of a unilateral contract—the employees' bargained-for action needed to make the offer binding being their continued work when they have no obligation to continue"), *modified*, 499 A.2d 515 (N.J. 1985); 2-6 CORBIN, *supra* note 12, § 6.2; Yoder, *supra* note 105, at 1523.

²⁷⁰ The foregoing discussion summarizes and expands upon issues discussed in the author's prior work. See Arnow-Richman, *Mainstreaming Employment Contract Law*, *supra* note 25, at 1563–68 (critiquing application of unilateral contract theory to employment relationships).

²⁷¹ See Arnow-Richman, *Foreword*, *supra* note 35, at 1–3 (describing complex mix of obligations, expectations, and informal promises between employers and employees).

²⁷² Arnow-Richman, *Mainstreaming Employment Contract Law*, *supra* note 25, at 1563.

the extent they are otherwise enforceable, the terms of the covenant contractually bind the employee, irrespective of his or her ability to decide whether and when to cease work.

The existence of mid-term modifications underscores the inadequacy of a unilateral contract framework. Indeed, modification is anathema to unilateral contract theory, which finds no contract until performance is already complete. To use the classic example, if *A* promises *B* she will pay him \$200 if he walks across the Brooklyn Bridge, there is no contract and nothing to modify until *B* crosses.²⁷³ *A* can choose to change the terms for any future performance, that is, she can tell *B* that she will pay him to cross again at a lower rate or under different conditions. But contract law does not allow her to alter the terms of her promise or the required performance during the course of *B*'s crossing. Rather she must hold the promise open for a reasonable amount of time to enable *B* to complete the performance he has begun.²⁷⁴ In persisting with a unilateral contract framework, courts enforcing mid-term modifications are effectively treating every change in terms as the completion of one contract and the start of a new one. This parceling out of work into a series of discrete performances accords neither with reality nor with party expectations.²⁷⁵ From the perspective of the employee, certainly, it feels more like the terms have changed while he was making his way across the bridge.²⁷⁶

Viewed in this light, employment is better characterized as a bilateral contract of indefinite duration, one in which both parties make future-looking promises yet preserve significant discretion as to their scope and duration. From this perspective, reasonable notice reveals itself as a means of limiting party discretion, thereby supplying the modicum of obligation necessary to render the relationship binding. This idea resonates with the broader duty of good faith that applies not merely in the context of modification but throughout the contractual relationship as a way of ensuring that

²⁷³ This example is generally attributed to Professor I. Maurice Wormser's article *The True Conception of Unilateral Contracts*, 26 YALE L.J. 136, 136 (1916). See Hazel Beh & Jeffrey W. Stempel, *Misclassifying the Insurance Policy: The Unforced Errors of Unilateral Contract Characterization*, 32 CARDOZO L. REV. 85, 93 (2010).

²⁷⁴ See RESTATEMENT (SECOND) OF CONTRACTS § 45.

²⁷⁵ *Bankey v. Storer Broad. Co.*, 443 N.W.2d 112, 116 (Mich. 1987) (describing this characterization as "strikingly artificial" because "[f]ew employers and employees begin each day contemplating whether to renew or modify the employment contract in effect at the close of work on the previous day").

²⁷⁶ The burden of this result on the offeree is precisely why the *Restatement (Second) of Contracts* drafters rejected the classical rule permitting revocation up until the point of completed performance. It is surprising, if not ironic, that courts permit such an outcome in the case of an employee, an especially vulnerable offeree, in view of the fact that both contemporary courts and contract scholars have seen fit to do away with the rule in the context of mainstream contract relationships, including between parties of more equal bargaining power.

one party does not abuse the legitimate expectations of the other. In a case where contractually reserved discretion is broad enough to potentially render a proffered performance or promise illusory, the implied duty tempers the promisor's exercise of discretion thereby infusing the relationship with consideration. *Wood v. Lucy, Lady Duff-Gordon*, the well-known 1917 New York Court of Appeals case involving a fashionista's grant of an exclusive marketing right to a promoter, provides the classic illustration.²⁷⁷ Although the parties' contract did not expressly bind the promoter to do anything, then-Judge Cardozo implied an obligation on his part to use reasonable efforts to market and sell Lady Duff's merchandise.²⁷⁸

In the employment context, reasonable notice is arguably playing the same role as Cardozo's implied reasonable efforts term, both with respect to initial terms of employment, as well as at the point of modification. This is clearest in the context of employee handbooks where the reasonable notice rule evolved. When an employer issues a handbook, those courts that permit unilateral modification are assuming that the employer has committed to abiding by the policy only temporarily, reserving discretion to terminate or alter it in the future.²⁷⁹ Were that all, the initial handbook policies might be deemed illusory, dependent on the whim of the employer, who might change or cancel them at any moment. But a reasonable notice requirement creates a limitation on that discretion, justifying the employee's reliance, at least while the policy is in effect.²⁸⁰

²⁷⁷ 118 N.E. 214 (N.Y. 1917).

²⁷⁸ *Id.* at 215.

²⁷⁹ One question courts have faced is whether the employer must expressly reserve that discretion in its initial policy documents in order to subsequently terminate or modify their terms. Several courts faced with this question have held that the power to modify is implicit given the absence of a fixed term for the original policy. *See, e.g., Bankey*, 443 N.W.2d at 121 (concluding that employer "may . . . unilaterally change a written discharge-for-cause policy . . . even though the right . . . was not expressly reserved at the outset"); *see also* Slawson, *supra* note 105, at 29 (opining that a right to make procedural adjustments is an implicit term of any employee handbook). Such cases, however, are unlikely to continue to arise with any frequency insofar as the inclusion of disclaimer language limiting the duration and enforceability of employer-issued policies has become a standard tool in management-side legal practice. Rather, the more common question is whether the inclusion of such language defeats the significance of the original terms altogether. In reported cases about modifications, the employer usually concedes for the purpose of litigation that the original terms were binding irrespective of such disclaimer language.

²⁸⁰ To the extent that the duty of good faith applies to areas of reserved employer discretion, it is possible to imagine an implied obligation not only to provide employees reasonable notice of proposed changes in terms, but also to keep the original policy in effect for a reasonable period of time. *Asmus* lends support to that view. 999 P.2d at 73 ("An employer may unilaterally terminate a policy that contains a specified condition, if the condition is one of indefinite duration, *and the employer effects the change after a reasonable time*, on reasonable notice, and without interfering with the employees' vested benefits." (emphasis added)). The *Asmus* court notes, and the facts show, both that the employees enjoyed the benefits of the MESP for a significant period of time

More importantly, reasonable notice provides an additional consideration at the point in time at which the employer attempts to alter or retract its terms. Thus, if an employer announces that as of the next fiscal year it will prospectively modify its formal vacation policy to reduce the amount of paid time off accrued per week of service, affected employees have the benefit of a policy with a fixed duration rather than one with an indefinite term.²⁸¹ In short, the reasonable notice requirement has the effect of requiring the employer to maintain and abide by its original terms for an amount of time equivalent to the length of the notice period. Moreover, if the employer asserts that employees must sign the new policy to remain employed, or that they will be deemed to have accepted it by continuing to work past its effective date, reasonable notice also serves to temporarily protect an employee from termination based on his or her opposition to changed terms. It postpones the point in time at which the employee must accept or risk being fired.

In the noncompete and arbitration contexts, reasonable notice would play the same role, albeit in temporarily preserving the employee's background rights rather than fixing the length of a contractually conferred benefit. An employer that provides reasonable notice of a required noncompete or arbitration agreement to an incumbent employee implicitly grants that employee a defined amount of time in which he or she can continue to rely on and enforce the underlying rights. For the duration of the notice period, the employee can sue the employer in court or defect to a competitor. In the language of consideration, the employer is promising to forebear from soliciting a waiver of those rights for the length of the notice period.

This understanding of the relationship between reasonable notice and contract consideration helps explain the unique inquiry into limitations on employer discretion in the context of arbitration policies. As discussed previously, when determining the enforceability of arbitration agreements courts have generally required the employer to make a reciprocal promise to arbitrate, both where arbitration agreements are presented mid-employment as well as at the outset of the relationship.²⁸² In a number of cases, employ-

and that Pacific Bell gave its employees reasonable and ample notice of its intent to terminate the MESP. *See id.*

²⁸¹ The use of an example that does not involve a job security policy is intentional, as this Article focuses on the modification of at-will employment terms. The special situation of employer handbook policies purporting to limit employers' termination rights is discussed *infra* notes 316–344 and accompanying text.

²⁸² As previously noted, it is anomalous that some courts are unwilling to treat an offer of at-will employment as the consideration for an arbitration agreement entered into at the start of the relationship. Courts almost universally find that such an offer suffices as consideration for a non-compete, irrespective of the employer's discretion to terminate at will. But to the extent these courts treat a promise of at-will employment as illusory for arbitration purposes, it is not surpris-

ees have challenged the binding nature of the employer's promise, arguing that because the employer retained the power to cancel or alter its policy, its promise was illusory, rendering the employee's own promise to arbitrate unenforceable.²⁸³ Courts have recognized, however, that if the employer limits its ability to cancel or alter the policy in some way, as by promising that changes will be adopted only upon advance notice, this will sufficiently constrain employer discretion, creating a binding reciprocal contract to arbitrate.²⁸⁴

At least one court has gone further and *implied* an obligation on the part of the employer to provide reasonable notice of unilateral changes to its arbitration policy in order to preclude a finding that the employer's promise to arbitrate was illusory. *Serpa v. California Surety Investigations, Inc.*, a 2013 California Court of Appeal case involved both an arbitration agreement and a handbook policy.²⁸⁵ The issue there was not the validity of a modification, but rather the conscionability of the employer's arbitration program, which the employee consented to at the time of hire.²⁸⁶ The

ing that they are unwilling to find consideration in an employer's promise to abide by an arbitration policy that reserves significant employer discretion.

²⁸³ See, e.g., *Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202, 205 (5th Cir. 2012) (noting that "where one party to an arbitration agreement seeks to invoke arbitration to settle a dispute, if the other party can suddenly change the terms of the agreement to avoid arbitration, then the agreement was illusory from the outset"); *Snow v. BE & K Constr. Co.*, 126 F. Supp. 2d 5, 15 (D. Me. 2001) (declaring that "it would be fundamentally unfair to hold Plaintiff to the terms of the booklet, when Defendant retains its ability to evade the booklet's terms entirely"); *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770, 776-77 (Mo. 2014) (en banc) (stating that if the employer "retains unilateral authority to amend the agreement retroactively, its promise to arbitrate is illusory"); *Piano v. Premier Distrib. Co.*, 107 P.3d 11, 15 (N.M. Ct. App. 2004) (noting in rejecting arbitration agreement that "although Defendant cannot modify the terms of the Arbitration Agreement any way or at any time, it may, in its sole discretion, modify the terms of the Arbitration Agreement provided that it complies with the minimal formalities set forth"); *Jenkins v. United Healthcare, No. 7371-99*, 2000 WL 298912, at *2 (D.C. Super. Ct. Feb. 16, 2000) (asserting that unilateral provisions "to alter, amend, modify, or revoke the [arbitration policy] at any time" does not give adequate notice of the terms and "[s]uch a lack of consideration vitiates any contract between the parties").

²⁸⁴ See, e.g., *Batory v. Sears, Roebuck & Co.*, 124 F. App'x 530, 534 (9th Cir. 2005) (noting that consideration was sufficient where employer's "discretion to modify the [arbitration agreement] is limited in two important respects: [i]t must provide employees 60 days' notice of termination or any modification, and it cannot modify the [agreement] with respect to a previously submitted claim"); *Pierce v. Kellogg, Brown & Root, Inc.*, 245 F. Supp. 2d 1212, 1215 (E.D. Okla. 2003) (noting that the "prospective application of the amendment or termination provisions, when combined with the ten-day notice provision, constitutes a significant limitation on [the employer's] right to modify, amend, or cancel such that the agreement to arbitrate is not an illusory one"); *In re Halliburton Co.*, 80 S.W.3d 566, 570 (Tex. 2002) (holding that the ability to modify or change the arbitration program was not illusory because termination was not retroactive and would not be effective "until 10 days after reasonable notice of termination is given to Employees").

²⁸⁵ 155 Cal. Rptr. 3d 506, 509 (Ct. App. 2013).

²⁸⁶ *Id.* at 509-10.

agreement signed by the employee incorporated by reference the employer's full arbitration policy, located in the company's employee handbook, which stated that both the employee and the company agreed to submit disputes to arbitration.²⁸⁷ Thus, the policy included the requisite reciprocal promise by the employer.²⁸⁸ The handbook in which the policy was located, however, contained a right-to-revise clause, stating that the employer reserved "the right to revise, modify or delete any provision or policy in this Handbook . . . at any time."²⁸⁹ Similarly, the acknowledgement signed by the employee upon receipt of the handbook attested to her understanding that "all policies or practices [in the Handbook] can be changed at any time by the employer" and that "the employer reserves the right to amend, modify, rescind, delete, supplement or add to the provisions of the Handbook, as it deems appropriate . . . in its sole discretion."²⁹⁰

In her subsequent suit for discrimination and related wrongful termination claims, the employee sought to avoid enforcement of the arbitration policy, arguing not that the policy was non-binding, but that it was unconscionable based on the employer's reservation-of-rights provision.²⁹¹ The court rejected this argument, concluding that the implied duty of good faith placed implicit limits on the employer's power to modify, preserving the reciprocal nature of the policy.²⁹² Citing *Asmus*, the court observed, "[I]mplied in the unilateral right to modify is the accompanying obligation to do so upon reasonable and fair notice."²⁹³ Thus, the court held that notwithstanding the literal text of the employer's reservation of rights clause, the policy would be interpreted to require the employer to provide notice of any changes pursuant to the implied duty of good faith.²⁹⁴ "[T]he implied covenant of good faith and fair dealing," concluded the court, "saves this arbitration contract from being illusory."²⁹⁵

Although *Serpa* is not itself a modification case, its analysis of the employer's reservation of rights clause supports the notion of reasonable notice

²⁸⁷ *Id.* at 508–09.

²⁸⁸ *Id.* at 513.

²⁸⁹ *Id.* at 509.

²⁹⁰ *Id.*

²⁹¹ *Id.* at 509–10.

²⁹² *Id.* at 514–15.

²⁹³ *Id.* at 516 (citing *Asmus*, 999 P.2d at 81).

²⁹⁴ *Id.* As discussed *infra* notes 346–371 and accompanying text, this same rationale has been invoked by courts in refusing to give full effect to similar provisions reserving the right to alter terms in the context of long-term consumer service agreements. See David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 630–36 (2010) (discussing cases involving unilateral imposition of arbitration clauses into consumer credit card agreements). Indeed, *Serpa* relied in part on the consumer case law. See *Serpa*, 155 Cal. Rptr. 3d at 514 (citing *Badie v. Bank of Am.*, 79 Cal. Rptr. 2d 273, 281 (Ct. App. 1998)).

²⁹⁵ *Serpa*, 155 Cal. Rptr. 3d at 515.

as a consideration equivalent in the context of a mid-term modification. According to *Serpa*, the obligation to provide notice can be judicially implied and its implication cures illusoriness. Just as the implied duty to provide reasonable notice of employer-initiated changes renders an otherwise illusory promise to arbitrate enforceable, a judicially-created reasonable notice rule ensures that a modicum of consideration passes to affected employees whenever the employer exercises its right to unilaterally insist on additional employee promises or concessions.

IV. THE SCOPE AND LIMITATIONS OF A REASONABLE NOTICE RULE

Both employers and worker advocates are likely to be skeptical of the unilateral modification plus notice approach—the latter due to its failure to more aggressively limit employers’ modification rights, the former because of the uncertainty and administrative burden inherent in a reasonableness standard. This Part offers preliminary thoughts on such issues, beginning in section A with an examination of the impact of reasonable notice in light of employees’ limited bargaining power.²⁹⁶ Section B proposes a reasonable notice period ranging from approximately two weeks to three months, depending on the nature of the modification.²⁹⁷ That time period should grant workers a meaningful opportunity to respond—whether through concerted activity, personal planning, negotiation, or resignation. It will also offer employers guidance and an outer limit on the extent of notice required, easing the administrative burden of the rule.

The Part goes on to consider particular application issues, including the role of reasonable notice in the context of job security promises and the viability of employer efforts to eliminate the advance notice requirement through handbook language or form agreements. Section C argues that unilaterally drafted “no notice” clauses should be presumed unenforceable, consistent with trends in the regulation of consumer contracts.²⁹⁸ Section D argues that the applicability of the reasonable notice rule to job security policies must be determined through a case-by-case inquiry, focusing on the scope of the original promise.²⁹⁹

A. Reasonable Notice and Employee Bargaining Power

An initial question regarding the adoption of a unilateral modification plus notice rule is the extent to which advance notice will assist employees. An explicit premise of this Article is that employees frequently lack the

²⁹⁶ See *infra* notes 300–315 and accompanying text.

²⁹⁷ See *infra* notes 316–344 and accompanying text.

²⁹⁸ See *infra* notes 346–371 and accompanying text.

²⁹⁹ See *infra* notes 372–388 and accompanying text.

ability to insist on their preferred terms of employment.³⁰⁰ The Article also presupposes the continued existence of employment at will.³⁰¹ It is therefore fair to ask whether reasonable notice will do anything to enhance an employee's bargaining position in the face of a proposed change in terms. The answer to that question is contextual, depending in part on the individual employee and in part on the nature of the modification.

The primary purpose and effect of an advance notice requirement is to give at-will employees time to explore alternatives. What makes mid-term modifications especially pernicious is that they constrain employees' ability to exercise what is often their only means of opposing unfavorable terms—the ability to refuse to work. An applicant for employment who is offered unfavorable terms can at least make a reasoned decision whether to accept the position in the context of an active job search.³⁰² He or she can compare the employer's terms against other offers, his or her current job, or the desirability of continuing the search. An incumbent employee who is invested in his or her current position and not actively gauging the market is not able to make this type of informed decision or take the risk of leaving his or her job in search of better terms. He or she must simply accept, deferring the possibility of seeking alternate employment to the indefinite future, while suffering the unfavorable terms for the duration of employment.³⁰³ Reasonable notice thus creates an opportunity for the incumbent employee to “shop around.”³⁰⁴ He or she can more carefully consider the proposed terms, ex-

³⁰⁰ See *supra* notes 34–41 and accompanying text.

³⁰¹ See *supra* note 26 and accompanying text.

³⁰² This presupposes that the applicant is made aware of all terms of employment in advance of accepting the job. Not infrequently, however, employees accept or begin employment based only on core terms (salary, title, etc.) and are provided with the “fine print” terms after accepting or commencing work. See, e.g., *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 374 (6th Cir. 2005) (employees “hired on the spot” signed arbitration agreements days into employment); *Menzies Aviation (USA), Inc. v. Wilcox*, 978 F. Supp. 2d 983, 988 (D. Minn. 2013) (employee required to sign a “large stack of documents” including noncompete a few days into employment). The author has discussed this problem of “cubewrap” employment terms elsewhere at length. See Arnow-Richman, *Worker Mobility*, *supra* note 4, at 966–67 (critiquing cubewrap contracts for exacerbating bargaining power imbalance between employer and employee); Arnow-Richman, *Cubewrap Contracts*, *supra* note 2, at 640–41 (describing situation where standard form employment documents are left in employees' cubicles to be signed shortly after they begin working). Terms provided to the employee immediately after acceptance raise concerns similar to those that arise in the mid-term modification context and further suggest the possibility of deceptive or misleading hiring practices. See Arnow-Richman, *Cubewrap Contracts*, *supra* note 2, at 651.

³⁰³ This is especially problematic in the case of mid-term noncompetes, where the employee's acquiescence directly impairs his or her ability to subsequently accept work elsewhere. With regard to other mid-term modifications, the harm is simply that the employee is immediately subject to the new terms and will be until he or she is able to find alternate employment.

³⁰⁴ See Arnow-Richman, *Cubewrap Contracts*, *supra* note 2, at 663 n.119.

plore the viability of quitting to go elsewhere, and credibly leverage the threat of departure in negotiating with the current employer.³⁰⁵

Of course, not all mid-term modifications are likely to be so unwelcome as to prompt employees to seek alternate employment. Neither is the possibility of alternate employment realistic for all workers even with sufficient notice. In such cases, advance notice can serve as a window for concerted activity, granting employees a period of time to discuss, critique, and potentially protest the change in terms. The opportunity for collective consideration of changed terms is especially important and appropriate in situations involving less salient modifications and those that apply to the workforce as a whole. An individual employee confronted with a formal non-compete contract may have some appreciation of the significance of that agreement.³⁰⁶ Employees confronted with an arbitration policy may be less likely to understand its implications, and may disregard it entirely if it is packaged as part of the employer's general policies.³⁰⁷ Disseminating the policy in advance with a designated effective date, however, creates an opportunity for the unusually conscientious employee to examine its contents and communicate with others workers. These "readers" can offer their opinions about the employer's terms, gain the interest and attention of their co-workers, and potentially trigger group action.³⁰⁸

Although the days of aggressive labor actions have long past, there has been renewed attention to concerted activity perpetuated by individuals or

³⁰⁵ For instance, a valuable employee asked to sign a noncompete may be able to influence the breadth of the agreement—its duration, geographic scope, or definition of competition—even if he or she is unable to refuse the agreement completely.

³⁰⁶ Cf. Rachel Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes*, 80 OR. L. REV. 1163, 1167 (2001) (questioning whether employees accepting formal noncompetes have knowledge of the risks involved).

³⁰⁷ See Christine M. Reilly, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 CALIF. L. REV. 1203, 1225 (2002) ("Most employment applicants, though able to identify the most basic differences between arbitration and litigation, do not understand the remedial and procedural ramifications of consenting to arbitration. Very few are aware of what they are waiving when they agree to mandatory arbitration.").

³⁰⁸ This is similar to the notion put forth by some commentators in the consumer contract context, namely that a handful of especially diligent "readers" of form contracts can place adequate market pressure on sellers to ensure efficient terms. See, e.g., Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 690–92. The theory is that where sellers cannot easily distinguish between "readers" and "non-readers," they must draft their terms to satisfy the readers. Gillette, *supra*, at 691–92 ("Sellers who are unable or fail to differentiate among reading and nonreading buyers, and who participate in relatively competitive industries where capturing the marginal buyer increases profitability, will offer the same terms to all buyers that they offer to reading buyers."). In the employment context, readers will likely be easier to identify (and may even self-identify), but because of employers' strong desire for uniform policies they are likely to make any adjustment in terms universal.

small groups of employees working in non-union environments. Widespread access to personal electronic devices and the use of social media platforms has enabled workers to swiftly voice job-related complaints and concerns and connect with friends and co-workers.³⁰⁹ Such activity can meet the definition of protected concerted activity under the National Labor Relations Act.³¹⁰ In a number of widely noted decisions, the National Labor Relations Board has protected employee social media posts and comments from employer retaliation,³¹¹ and a series of memoranda from the Board's General Counsel suggests that the agency is willing to pursue unfair labor practice charges in such situations.³¹²

Whether employees are able to leverage such channels effectively and achieve more favorable terms of employment remains to be seen, but anecdotal evidence of successful consumer campaigns offers reason for optimism. In one example, a group of aggrieved consumers convinced General Mills, the stalwart cereal company, to retract its arbitration policy.³¹³ Expressions of dissatisfaction with the policy began on Facebook and Twitter, gathered momentum in the blogosphere, and ultimately culminated in a public apology by the company.³¹⁴ In the employment context, reasonable

³⁰⁹ See generally Rafael Gely & Leonard Bierman, *Social Isolation and American Workers: Employee Blogging and Legal Reform*, 20 HARV. J.L. & TECH. 287 (2007) (discussing the importance of employee blogs and their need for greater legal protection).

³¹⁰ Section 7 of the National Labor Relations Act ("NLRA") grants employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (2012).

³¹¹ See, e.g., *Pier Sixty, LLC*, 362 N.L.R.B. No. 59 (Mar. 31, 2015) (finding employee's Facebook post criticizing superior and encouraging unionization protected as concerted activity); *Three D, LLC*, 361 N.L.R.B. No. 31 (Aug. 22, 2014) (finding employees' Facebook posts discussing superior's bookkeeping errors protected as concerted activity); *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. (Dec. 14, 2012) (finding employees' Facebook posts discussing co-worker protected as concerted activity); see also James Long, Note, *#Fired: The National Labor Relations Act and Employee Outbursts in the Age of Social Media*, 56 B.C. L. REV. 1217, 1219–20 (2015) (discussing application of NLRA's protection of concerted activity to employees' use of social media).

³¹² See generally DIV. OF OPERATIONS-MGMT., OFFICE OF THE GEN. COUNSEL, NAT'L LABOR RELATIONS BD., MEMORANDUM OM 12-59, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES (2012) (summarizing recent NLRB decisions concerning social media); DIV. OF OPERATIONS-MGMT., OFFICE OF THE GEN. COUNSEL, NAT'L LABOR RELATIONS BD., MEMORANDUM OM 12-31, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES (2012) (same); DIV. OF OPERATIONS-MGMT., OFFICE OF THE GEN. COUNSEL, NAT'L LABOR RELATIONS BD., MEMORANDUM OM 11-74, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES (2011) (same).

³¹³ Stephanie Strom, *General Mills Reverses Itself on Consumers' Right to Sue*, N.Y. TIMES (Apr. 20, 2014), <http://www.nytimes.com/2014/04/20/business/general-mills-reverses-itself-on-consumers-right-to-sue.html> [<http://perma.cc/Y93B-2LVX>] (reporting on company's decision to revise its website terms in response to public concern).

³¹⁴ Ricardo Lopez, *General Mills Abandons Mandatory Arbitration After Consumer Outcry*, L.A. TIMES (Apr. 21, 2014), <http://www.latimes.com/business/la-fi-mo-general-mills-legal-policy->

notice can ideally enable similar, if less dramatic, conduct. Given a window of time in which to evaluate and discuss proposed changes of employment, employees may be more capable of making common decisions for purposes of influencing employer policy.

In situations where employees can neither influence employer policy nor go elsewhere, reasonable notice still serves the purpose of giving employees time to prepare for the modification. The advance notice period acts as a window in which employees can rely on their prior rights in ways that anticipate their imminent loss. For instance, commission-based employees faced with a change in compensation structure might direct their energy toward closing particular deals prior to the change. Rank-and-file wage earners faced with a prospective pay cut might save more from their remaining checks at current rates of pay. Long-term employees faced with a loss of seniority protection might endeavor to improve performance. Employees anticipating an arbitration agreement, or an adverse change to an existing arbitration policy, can initiate their claims prior to its adoption. Any number of responses is possible, depending on the situation of the employee and the nature of the modification.

Finally, it is possible that a reasonable notice requirement may positively influence firm behavior. Whether because of the administrative burdens of notice or the prospect of some adverse response, a reasonable notice rule might discourage employers from implementing some subset of changes or at least make them more deliberative in doing so. At best, a reasonable notice rule can engender better management practices, tempering unilateral

reversal-20140421-story.html [https://perma.cc/7NDK-BAW2] (reporting on company's blog post apology). For other examples of successful Internet-based consumer campaigns, see, e.g., M. Alex Johnson, *PayPal Backs down on Controversial New Robocall Policy*, NBC NEWS (June 29, 2015), <http://www.nbcnews.com/news/us-news/paypal-backs-down-controversial-new-robocall-policy-n384116> [http://perma.cc/34GX-CVYT] (reporting how consumer outrage over new PayPal policy led company to rescind policy); Farhad Manjoo, *Tweeting Avengers*, SLATE (Sept. 1, 2009), http://www.slate.com/articles/technology/technology/2009/09/tweeting_avengers.single.html [http://perma.cc/3CDK-TJ8M] (discussing success of online consumer campaigns involving Comcast and Maytag); Graeme McMillan, *Random House Rescinds Controversial E-Book Contract After Online Outrage*, WIRED (Mar. 14, 2013), <http://www.wired.com/2013/03/scalzi-e-book-authors/> [http://perma.cc/2XZT-XSLB] (reporting how consumer outrage about new publishing contracts led publishing company to change contracts); Craig Timberg, *Instagram, Facebook Stir Online Protests for Privacy Policy Change*, WASH. POST (Dec. 18, 2012), http://www.washingtonpost.com/business/technology/instagram-facebook-stirs-online-protests-for-privacy-policy-change/2012/12/18/6c105d92-4948-11e2-b6f0-e851e741d196_story.html [http://perma.cc/8QKY-8QCZ] (reporting how consumer outrage about new Instagram privacy policy led to company's apology and policy clarification).

action and incenting greater discussion between companies and their workforce about fair terms of employment.³¹⁵

B. Defining Reasonableness

Whereas employee advocates are likely to argue that a reasonable notice rule does not go far enough in restricting mid-term modifications, employers are likely to complain that the rule is administratively burdensome and interferes with managerial flexibility. Under a unilateral modification plus notice rule, employers will be unable to effectuate changes as expeditiously as their business interests would otherwise dictate. They are also likely to have particular concerns about the use of a reasonableness standard to define the requisite notice period. Employers have a legitimate need to know how much notice to provide and in what form in order to ensure that their policy changes are effective.³¹⁶ A reasonableness standard leaves employers vulnerable to litigation over whether the notice provided by the employer for a particular modification was sufficient.³¹⁷

Such concerns can be mitigated through judicial elaboration on the nature and purpose of a reasonable notice rule and by identifying an outer limit on the requisite notice period. Unfortunately, such guidance has been slow coming in the handbook context despite several courts' adoption of a unilateral modification plus notice approach.³¹⁸ Few reported decisions apply the rule or engage the reasonableness question. Those that have offer limited and questionable analysis. Several courts have equated reasonable notice with actual notice, asking merely whether the change in policy was communicated

³¹⁵ See, e.g., *Langager v. Crazy Creek Prods., Inc.*, 954 P.2d 1169 (Mont. 1998) (describing how employer distributed new handbook to its employees, then held a follow up meeting at which employees could discuss the contents after reviewing them).

³¹⁶ See *Yoder*, *supra* note 105, at 1518–21 (discussing uncertainty that results from courts' varying approaches to handbook modifications). Similar concerns have been cited as reasons to reject the formal modification rule. See, e.g., *Demasse v. ITT Corp.*, 984 P.2d 1138, 1161 (Ariz. 1999) (en banc) (Martone, J., concurring in part and dissenting in part) (contending that such a rule “will create havoc with employer–employee relations,” as “[n]o employer will ever issue one for fear of endless obligation”); *Bankey v. Storer Broad. Co.*, 443 N.W.2d 112, 120 (Mich. 1987) (warning that under such a rule “the employer could find itself obligated in a variety of different ways to any number of different employees, depending on the modifications which had been adopted and the extent of the work force turnover”).

³¹⁷ See *Yoder*, *supra* note 105, at 1534 (“[T]he vagueness among courts following this approach over what constitutes ‘reasonable’ notice does little to resolve the confusion over handbook jurisprudence and may at times offer scant protection to abused workers.”).

³¹⁸ See, e.g., *Asmus v. Pacific Bell*, 999 P.2d 71 (Cal. 2000); *Bollinger v. Fall River Rural Elec. Coop., Inc.*, 272 P.3d 1263 (Idaho 2012); *Bankey*, 443 N.W.2d 112; *Fleming v. Borden, Inc.*, 450 S.E.2d 589 (S.C. 1994); *Gaglidari v. Denny’s Rest., Inc.*, 815 P.2d 1362 (Wash. 1991); *Hogue v. Cecil I. Walker Mach. Co.*, 431 S.E.2d 687 (W. Va. 1993); *Quijano v. Atkins-Kroll, Inc.*, 2008 Guam 14 (Guam 2008). See generally *supra* notes 104–133 and accompanying text (discussing unilateral modification plus notice approach to handbooks).

to the employee.³¹⁹ This approach ensures that employees are aware of the employer's changes, but does not give workers time to evaluate and respond to the new terms. To be sure, those jurisdictions that have adopted unilateral modification plus notice have not explicitly embraced this justification for the rule. But the mere fact of an employee's awareness that he or she is entering into a modification is already a fundamental component of contractual assent.³²⁰ Courts have required employers to demonstrate actual notice of the disputed terms irrespective of their approach to modification.³²¹ It would appear that courts permitting unilateral modification only upon reasonable notice have something more in mind.³²²

The more sensible reading is that reasonable notice requires some non-negligible interval of time between notice and implementation. The U.S. Court of Appeals for the Ninth Circuit has taken this view in applying *Asmus v. Pacific Bell*, the 2000 California Supreme Court decision that adopted California's handbook modification rule.³²³ In *Davis v. Nordstrom, Inc.*, a 2014 decision from the Ninth Circuit, the employer sought to avoid the plaintiff's class action lawsuit alleging various wage and hour violations based on a modification to its arbitration policy that precluded class-based suits and required employees to arbitrate all claims individually.³²⁴ The em-

³¹⁹ See, e.g., *Fleming*, 450 S.E.2d 589; *Govier v. N. Sound Bank*, 957 P.2d 811 (Wash. Ct. App. 1998); see also *Yoder*, *supra* note 105, at 1534 (noting court's conflation of reasonable notice with actual notice). As previously discussed, the *Restatement of Employment Law* has endorsed this view. See RESTATEMENT OF EMP'T LAW § 2.05 (AM. LAW INST. 2015); *supra* notes 104–133 and accompanying text.

³²⁰ See 1 RICHARD A. LORD, WILLISTON ON CONTRACTS § 4:16 (4th ed. 2015) (“As a general principle, an offeree cannot actually assent to an offer unless the offeree knows of its existence.”).

³²¹ A number of cases have struck down arbitration policies where, due to the employer's method of dissemination, the employee likely had not noticed the change. See, e.g., *Campbell v. Gen. Dynamics Gov't Sys. Corp.*, 407 F.3d 546, 555–59 (1st Cir. 2005) (finding that an e-mail announcing a new arbitration policy requiring no affirmative response did not give the employee sufficient notice); *Hudyka v. Sunoco, Inc.*, 474 F. Supp. 2d 712, 716–17 (E.D. Pa. 2007) (finding that an e-mail announcing a new arbitration policy not marked as important or affecting employees' rights and using optional language did not provide sufficient notice); *Skirchak v. Dynamics Research Corp.*, 432 F. Supp. 2d 175, 180 (D. Mass. 2006) (same); *Archer v. Fujitsu Network Commc'ns*, 354 F. Supp. 2d 26, 36–37 (D. Mass. 2005) (finding the posting of an arbitration policy on the employer's website with no evidence of access by the employee to be insufficient notice).

³²² Indeed, the California Supreme Court in *Asmus v. Pacific Bell* seems to suggest not only that a mid-term handbook modification requires reasonable *advance* notice, but that the original policy must endure for a reasonable period of time. See *Asmus*, 999 P.2d at 73 (“An employer may unilaterally terminate a policy that contains a specified condition, if the condition is one of indefinite duration, and the employer effects the change *after a reasonable time*, on reasonable notice, and without interfering with the employees' vested benefits.” (emphasis added)).

³²³ *Davis v. Nordstrom, Inc.*, 755 F.3d 1089, 1094–95 (9th Cir. 2014) (holding employer provided reasonable notice of handbook modification as required by *Asmus*); *Asmus*, 999 P.2d at 73.

³²⁴ 755 F.3d at 1089.

ployer's revisions, which occurred in July and August of 2011, were first distributed to the employees in June.³²⁵ At that time, the existing arbitration policy stated that the employer would provide thirty days' notice of any changes to the policy.³²⁶ The court held that the employer had complied with its own notice provision and California's reasonable notice rule.³²⁷

In so holding, however, the court rejected the employee's argument that the notice she received was inadequate because it did not explicitly state that the changes would be effective in thirty days.³²⁸ An interpretation more consistent with the goal of granting employees time to prepare for or respond to proposed changes would require the employer to make clear that the changes will only be implemented as of a specified future date. A notice that could lead the employee to think the changes are immediately effective does not achieve the purpose of the rule. Indeed, the *Davis* court seemed to recognize the weaknesses of the notice provided in that case, acknowledging that the employer's communication with its employees was not "the model of clarity."³²⁹ It allowed the modification, however, noting that the employer did not seek to enforce the modification against the employee within the thirty-day period.³³⁰ The fact that the original policy itself informed employees that thirty days' notice would be required for subsequent modifications presumably also influenced this result.

At a minimum, *Davis* stands for the proposition that there must at least be a period of time between notice and implementation and thirty days satisfies that time. A better view, and a safer interpretation for employers seeking to ensure enforceability, is that employers must explicitly identify the effective date in the notice communicating the change. This still leaves open the question of how much notice is required. *Davis* was an easy case inasmuch as the employer had already specified an intuitively reasonable notice period of thirty days.³³¹ Had the policy not contained such a provision, or designated a significantly shorter period, the court would have had to confront the question outright.³³² Cases adopting and applying a unilateral modification plus notice rule thus far have neither articulated a bright-line

³²⁵ *Id.* at 1091–92.

³²⁶ *Id.* The employer eliminated this obligatory notice requirement as part of its revisions. *Id.* at 1092 n.3.

³²⁷ *Id.* at 1094.

³²⁸ *Id.* at 1093.

³²⁹ *Id.* at 1094. Further confusing the matter was the fact that the cover letter to the modifications referred to the enclosed document as the "current version." *Id.* at 1093.

³³⁰ *Id.* at 1094.

³³¹ *See id.*

³³² The court would also have had to address the degree to which employers can eliminate or define the notice period by contract, a subject to which this Article returns *infra* notes 346–371 and accompanying text.

rule with respect to reasonableness, nor elaborated meaningfully on how reasonableness should be determined. Moreover, the amount of notice provided as a factual matter in such cases ranges significantly. On one end, courts have upheld modifications implemented immediately;³³³ at the other end is *Asmus*, which upheld a modification where employees received six months' advance notice of the change.³³⁴

Further refinement of the reasonableness standard ought to reflect the underlying purpose of the rule, which in turn requires one to consider the substance of the modification itself. As discussed previously, not every modification is likely to spur employees to seek alternate employment. Some might lead to negotiation; some might simply induce employee protest. At least one commentator has suggested a tiered approach to handbook modifications under which employees receive varying degrees of notice depending on whether the change is "procedural" or "substantive."³³⁵ Under this approach, employees would receive three months' advance notice for "substantive" modifications, such as changes in compensation structure, down to as little as one week for procedural modifications, such as changes to disciplinary procedures.³³⁶

Drawing distinctions based on which rights are substantive and which are procedural is a fraught business.³³⁷ Nevertheless, the idea of linking the amount of notice to the significance of the change makes sense. Under such an approach, one would require the greatest amount of notice for noncompetes. As previously noted, such agreements not only eliminate a critical baseline right, they also limit the employee's ability to leave subsequent to the modification.³³⁸ Changes to job security and compensation terms would be next in significance. Arbitration agreements and amendments to existing

³³³ See *Govier*, 957 P.2d at 813.

³³⁴ See *Asmus*, 999 P.2d at 73.

³³⁵ See *Yoder*, *supra* note 105, at 1540.

³³⁶ *Id.* at 1540–42.

³³⁷ See Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficiency*, 87 GEO. L.J. 887, 889 (1999) (observing that "procedure and [substance] [are] 'inextricably intertwined,' that ostensibly procedural rules sometimes involve[] policy choices, and that such choices ha[ve] important substantive effects" (quoting Dan Byron Dobbs, Comment, *Judicial Regulation of Procedure*, 9 ARK. L. REV. 146, 152–55 (1955))); Walter Wheeler Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 YALE L.J. 333, 336 (1933) ("In the case of the alleged distinction between 'substantive law' and 'procedural law', . . . for some purposes the basis for any such classification disappears entirely and all can be treated or regarded as 'substantive.'"); E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 325 (1986) ("Ultimately, procedure and substance cannot be divorced: no procedural decision can be completely 'neutral' in the sense that it does not affect substance."); Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 802 (2010) ("Procedure is an instrument of power that can, in a very practical sense, generate or undermine substantive rights.").

³³⁸ See *supra* notes 300–315 and accompanying text.

arbitration policies might be equally significant, depending on their content. Least significant would be adjustments in paid time off, disciplinary procedures, or other administrative policies, where the purpose of notice is merely to allow employees to oppose or prepare for the change rather than seek alternate employment.³³⁹ The amount of notice considered reasonable should also include considerations beyond just the significance of the modification to the employee. The reason behind the employers' change in policy and any circumstances requiring prompt adoption might justify a shorter notice period than what would otherwise be expected.

Returning to the amount of notice, the proposal to cap notice at three months has some administrative, as well as intuitive, appeal.³⁴⁰ A somewhat shorter amount may be more appropriate, however, in recognition of the fact that many employers will incline toward providing the maximum amount of notice as a matter of course for any change of significance in order to ensure enforceability. Recent legislative developments favoring advance notice in particular contexts suggest that two months may be a good benchmark. The Patient Protection and Affordable Care Act of 2010 requires employers to provide sixty days' advance notice of any material modification to health care plans that occur during the plan year.³⁴¹ In the consumer protection arena, the Credit Card Accountability Responsibility and Disclosure Act of 2009 ("CARD Act") requires credit card issuers to provide card-holders forty-five days' advance notice of annual percentage rate increases, as well as other significant terms such as fees and finance charges.³⁴² As in the employment context, the purpose of requiring advance notice in the credit card context is to give consumers time to adjust to the proposed change—whether by finding other sources of credit, paying off their balance, or simply developing a workable payment plan.³⁴³

³³⁹ Mid-term modifications to qualified plans under the Employee Retirement Income Security Act and the Patient Protection and Affordable Care Act would obviously be governed by those laws.

³⁴⁰ See Yoder, *supra* note 105, at 154 (setting a three-month period because it corresponds to one fiscal quarter).

³⁴¹ 42 U.S.C. § 300gg-15(d)(4) (2012); see also 29 U.S.C. § 1022 (2012) ("A summary of any material modification . . . shall be written in a manner calculated to be understood by the average plan participant.").

³⁴² 15 U.S.C. § 1637(i)(1)–(2) (2012); see Peter A. Alces & Michael M. Greenfield, *They Can Do What!? Limitations on the Use of Change-of-Terms Clauses*, 26 GA. ST. U. L. REV. 1099, 1128 (2010) (discussing adoption and effect of the CARD Act); Oren Bar-Gill & Kevin Davis, *Empty Promises*, 84 S. CAL. L. REV. 1, 5–6 (2010) (same). Along with the notice, the issuer must inform the consumer of the ability to terminate the card before the effective date. 15 U.S.C. § 1637(i)(3).

³⁴³ See David Smith, *The Credit CARD Act of 2009*, 47 HOUS. LAW. 28, 29 (2010) ("This [notice] provision is in response to the perception that companies 'hooked' customers on the credit card and then raised the rate without sufficient notice to allow the debtor to either pay off or move the balance.").

On the other side of the spectrum, at least two-weeks' notice seems appropriate for changes of modest impact. Two weeks is the amount of time employers typically expect employees to provide in advance of a voluntary termination.³⁴⁴ This is considered a matter of courtesy, if not of contract, allowing the employer to prepare for the loss of the employee. It therefore makes sense to require two weeks as the minimum notice period for mid-term modifications of limited impact. Because the goal of notice in that context is to allow the employee a measure of advance warning to prepare or respond, it is not necessary for the employee to have enough time to conduct a job search. Nevertheless, anything less than two weeks' notice is likely to be insufficient for even these more limited purposes.

In sum, it is likely to be challenging for courts to define and for employers to predict how much notice is reasonable, at least upon initial adoption of a reasonable notice standard. Courts and commentators have already begun that process, however, and legislative efforts provide a baseline for comparison. Whatever the benchmark, employers will have an incentive to identify a "highest common denominator" for what suffices as reasonable notice for particular types of modifications.³⁴⁵ Such efforts, combined with case law developments, should ultimately lead to a set of best practices on which employers can rely in managing their workforce.

C. Reasonable Notice and Employer-Drafted Change-of-Terms Provisions

The prospect of employer compliance efforts, however, is a double-edged sword. Some employers may develop a useful protocol regarding the appropriate amount of notice to provide for particular mid-term modifications. Others, however, may attempt to contract out of the obligation altogether by stating in their policies that the employer reserves the right to change terms without notice.³⁴⁶

³⁴⁴ See Jessica A. Magaldi & Olha Kolisnyk, *The Unpaid Internship: A Stepping Stone to a Successful Career or the Stumbling Block of an Illegal Enterprise? Finding the Right Balance Between Worker Autonomy and Worker Protection*, 14 NEV. L.J. 184, 185 (2013).

³⁴⁵ See Arnow-Richman, *Inside Out*, *supra* note 5, at 46 (using this term to describe management-side compliance practices that aim to avoid uncertainty and liability risk through over-compliance).

³⁴⁶ Many employers already include clauses purporting to reserve the right to change terms without notice in their employment manuals along with standard language disclaiming the manual's contractual significance. See, e.g., *Torosyan v. Boehringer Ingelheim Pharm., Inc.*, 662 A.2d 89, 95 (Conn. 1995) ("[P]ublication is distributed for general informational purposes only, and as such is subject to change without notice."); *Rowe v. Montgomery Ward, Inc.*, 473 N.W.2d 268, 270 (Mich. 1991) ("[T]hese conditions can be changed by the Company, without notice, at any time."); *In re 24R, Inc.*, 324 S.W.3d 564 (Tex. 2010) ("The Boot Jack reserves the right to revoke, change or supplement guidelines at any time without notice . . .").

The effectiveness of these “change-of-terms” clauses is unclear under current doctrine.³⁴⁷ There appears to be no reported decision in which a court has directly addressed whether an employer-drafted provision providing for no notice, or extremely limited notice, trumps an established reasonable notice rule. What is clear is that the insertion of a change-of-terms clause, whether or not it explicitly disclaims the obligation to provide notice, reduces the likelihood that the original policy will be deemed contractual.³⁴⁸ This gives employers a strong incentive to include change-of-terms clauses in their handbooks, in order to reduce the overall risk of implied contract liability. This in turn moots the modification question. If the original policy was never binding, there are no legal constraints on the employer’s ability to modify it, regardless of what the policy itself says on the matter.³⁴⁹

³⁴⁷ The phrase “change-of-terms” provision, which this Article adopts, comes from the consumer service contract arena where clauses purporting to allow providers to unilaterally change the terms of a consumer service plan are both commonplace and commonly litigated. *See infra* notes 348–371 and accompanying text.

³⁴⁸ Numerous cases have held that an employer-drafted disclaimer of the contractual significance of its employee handbook, irrespective of its modification terms, justifies an award of summary judgment. *See, e.g., Lee v. Sperry Corp.*, 678 F. Supp. 1415, 1418 (D. Minn. 1987); *Castiglione v. Johns Hopkins Hosp.*, 517 A.2d 786, 792 (Md. Ct. Spec. App. 1986).

³⁴⁹ It bears noting that scholars have widely criticized judicial deference to boilerplate disclaimers. *See, e.g.,* Befort, *supra* note 127, at 369–70 (describing such decisions as letting employers have their “cake and eat it too”); Jonathan Fineman, *The Inevitable Demise of Implied Employment Contract*, 29 BERKELEY J. EMP. & LAB. L. 345, 387 (2008) (arguing that the reasonable expectations of the employee should prevail “regardless of disclaimers to the contrary in handbooks”); Matthew W. Finkin, *The Bureaucratization of Work: Employer Policies and Contract Law*, 1986 WIS. L. REV. 733, 750 (calling judicial deference to boilerplate disclaimers as coming close to “deference to a fraud”); Clyde W. Summers, *The Rights of Individual Workers, the Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment At Will*, 52 FORDHAM L. REV. 1082, 1106–07 (1984) (calling for close scrutiny of overreaching provisions in contracts of employment including disclaimer clauses). Indeed, there are various reasons why an employee might expect an employer to abide by its manual regardless of such language. *See, e.g., Connor v. City of Forest Acres*, 560 S.E.2d 606, 611–12 (S.C. 2002) (finding the combination of promissory language and boilerplate disclaimers sufficiently confusing to create a question of fact as to whether the employee could reasonably believe the employer was bound by its disciplinary procedure and termination standards despite disclaimer language); *Baril v. Aiken Reg’l Med. Ctr.*, 573 S.E.2d 830, 836, 838 (S.C. Ct. App. 2002) (reversing summary judgment in favor of employer where handbook with disclaimer included mandatory language and assurances that the procedures would be followed); *see also* Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 139 (1997) (finding that 74% of survey respondents incorrectly believed that employers could not fire an at-will employee for purely cost-saving reasons even when shown a typical employment at will disclaimer); Jesse Rudy, *What They Don’t Know Won’t Hurt Them: Defending Employment-At-Will in Light of Findings That Employees Believe They Possess Just Cause Protection*, 23 BERKELEY J. EMP. & LAB. L. 307, 335 (2002) (finding 50% incorrect response rate in similar study of employee perception of disclaimer language). The effectiveness of disclaimers in general, however, is outside the scope of this Article. The point, rather, is that given

In the case of arbitration agreements, incentives cut the other way. Employers want these agreements to bind their employees and are thus inclined to contractually constrain their ability to modify rather than the reverse.³⁵⁰ Arbitration agreements that broadly reserve employer modification rights run the risk of being found illusory or unconscionable irrespective of when they are presented or whether they are ultimately modified.³⁵¹ This makes it unlikely that employers will attempt to circumvent a reasonable notice rule through a change-of-terms clause in the arbitration context. They are far more likely to affirmatively promise advance notice and to specify how much. The risk is that they will specify too little.

Legal and policy considerations suggest such one-sided, employer-drafted provisions ought not be enforced. The law of contract modification is, after all, part and parcel with the law of contract formation: a modification is viewed as a new contract.³⁵² The UCC good faith rule still requires mutual assent, notwithstanding its rejection of the common law consideration requirement.³⁵³ Such contract formalities comprise a set of first principles for effecting a binding mutual exchange; they are not default rules from which parties may deviate. Even contracting parties of equal bargaining

existing law, the legal effectiveness of a “no notice”-of-modification provision in allowing employers to immediately modify a binding policy is a question unlikely to reach the courts.

³⁵⁰ For this reason employer arbitration agreements often affirmatively state that advance notice of changes will be provided. *See, e.g., Davis*, 755 F.3d at 1092 (noting the employer’s arbitration policy required thirty days’ advance notice for changes.); *Fisher v. GE Med. Sys.*, 276 F. Supp. 2d 891, 895 (M.D. Tenn. 2003) (same); *Pierce v. Kellogg, Brown & Root, Inc.*, 245 F. Supp. 2d 1212, 1214 (E.D. Okla. 2003) (noting the employer’s arbitration policy required ten days’ advance notice for changes).

³⁵¹ *See, e.g., Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202, 204 (5th Cir. 2012) (holding that a disclaimer giving the employer a unilateral right to modify an arbitration clause was illusory and unenforceable); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1179 (9th Cir. 2003) (holding the employer’s ability to unilaterally modify the arbitration agreement rendered it substantively unconscionable); *Snow v. BE & K Constr. Co.*, 126 F. Supp. 2d 5, 14–15 (D. Maine 2001) (holding that a disclaimer giving the employer a unilateral right to modify an arbitration clause was illusory and unenforceable); *cf. Serpa v. Cal. Surety Investigations, Inc.*, 155 Cal. Rptr. 3d 506, 516 (Ct. App. 2013) (holding that the implied covenant of good faith and fair dealing prevented the employer from unilaterally modifying the arbitration agreement, and therefore the agreement was neither illusory nor unconscionable).

³⁵² *See infra* notes 148–159 and accompanying text. *See generally* 3 LORD, *supra* note 320, § 7:37 (describing in part the traditional common law approach to modification requiring new consideration to overcome the pre-existing duty rule).

³⁵³ *See U.C.C. § 2-209(1) cmt. 1 (AM. LAW INST. & NAT’L CONFERENCE OF COMM’RS ON UNIFORM STATE LAW 2015)* (“This section seeks to protect and make effective all necessary and desirable modifications of sales contracts without regard to the technicalities which at present hamper such adjustments.”); 2A DAVID FRISCH, LAWRENCE’S ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-209:23 (3d ed. 2015) (“U.C.C. § 2-209 eliminates only the contract formation requirement of consideration. In order to establish a modification, it must be shown that there was an agreement to modify the original contract. Mutual assent is required to establish the existence of a modification of the sales contract.” (footnote omitted)).

power operating at arm's length cannot bind themselves to a deal that gives one side absolute discretion to change the terms of exchange after the fact. It is for this reason that courts generally imply modest limitations on party discretion—most often an obligation to exercise due diligence or good faith.³⁵⁴ In some situations, courts imply a duty to provide reasonable notice,³⁵⁵ usually when the parties intend to be bound despite the illusory nature of their promises. Case law refusing to enforce arbitration policies that grant employers unlimited discretion to modify their terms is consistent with these principles.³⁵⁶

Thus, basic principles of mutuality and exchange supply cogent reasons why a change-of-terms clause providing for no advance notice should be void. A change-of-terms clause that merely limits the amount of notice, however, presents a closer question. A formalistic view would suggest that such clauses are enforceable. An employer's promise to provide even negligible notice arguably supplies the requisite peppercorn of consideration necessary to make the modification and the surrounding agreement binding. But the ability of a stronger party to cite a trivial amount of consideration to support a coercive modification was a key factor in the judicial and legislative retreat away from consideration in favor of a good faith standard.³⁵⁷ Allowing employers to effect an ex ante agreement permitting them to impose their desired terms without granting the employee reasonable time to consider the changes would be anathema to this move.

Further analysis of change-of-terms clauses is informed by statutory and common-law treatment of long-term consumer service agreements. Consumer credit agreements, Internet service and mobile phone plans, fre-

³⁵⁴ The classic example is *Wood v. Lucy, Lady Duff-Gordon*, in which then-Judge Cardozo held that a contract for an exclusive marketing license implicitly obligated the licensee to use best efforts to market the licensor's products. 118 N.E. 214, 215 (N.Y. 1917); see also *Locke v. Warner Bros., Inc.*, 66 Cal. Rptr. 2d 921, 926 (Ct. App. 1997) (holding in a movie development contract, which granted studio absolute discretion whether to pay plaintiff or develop her movie proposals, that the duty of good faith and fair dealing precluded categorical rejection of plaintiff's proposals and required studio to honestly evaluate them consistent with subjective standards of artistic quality); *Mezzanotte v. Freeland*, 200 S.E.2d 410, 412, 416 (N.C. App. 1973) (holding that a real estate contract contingent on buyers' ability to obtain financing was not illusory because the contract contained an implied promise that buyers would exercise good faith and reasonable efforts to secure commercially reasonable financing); 2-5 CORBIN, *supra* note 12, § 5.28 (discussing courts' implication of various good faith limitations on discretion in order to render an otherwise illusory promise enforceable).

³⁵⁵ See, e.g., *Sylvan Crest Sand & Gravel Co. v. United States*, 150 F.2d 642, 644–45 (2d Cir. 1945) (holding that an agreement containing no delivery specifications and permitting cancellation at any time implicitly required performance absent reasonable advance notice of cancellation). The author discusses the idea of reasonable notice as judicially-implied consideration at greater length in Arnow-Richman, *Mainstreaming Employment Contract Law*, *supra* note 25, at 1563–68.

³⁵⁶ See *supra* note 351 and accompanying text.

³⁵⁷ See *supra* notes 148–159 and accompanying text.

quent flier programs, and a variety of other indefinite service agreements often contain change-of-terms clauses that, like those contained in employee handbooks, purport to allow the provider to unilaterally modify the terms of the plan with or without notice.³⁵⁸ Like employment, these contracts are terminable at will and consist largely of adhesive terms drafted by the party with greater bargaining power.³⁵⁹ Courts addressing the enforceability of change-of-terms clauses in this context have reached different results depending on the facts presented and the particular legal theory applied.³⁶⁰ Several have invoked themes similar to those advanced above in support of non-enforcement in the employment area. For instance, a number of courts have narrowly interpreted change-of-terms clauses, in an attempt to limit the scope of the provider's discretion. Thus, *Badie v. Bank of America*, a 1998 California Court of Appeal decision, found that a bank's initiating agreement, allowing it to change or terminate any terms of the credit card-

³⁵⁸ A modest body of case law and several scholarly articles consider the enforceability of such clauses in the consumer context. *See, e.g.*, *Bank One v. Coates*, 125 F. Supp. 2d 819, 826, 836 (S.D. Miss. 2001) (enforcing an arbitration clause introduced via amendment to a credit agreement containing a change-of-terms clause where the issuer gave one month's advance warning and the option to reject the arbitration clause by written notice); *Badie v. Bank of Am.*, 79 Cal. Rptr. 2d 273, 290–91 (Ct. App. 1998) (holding an alternative dispute resolution provision added via a change-of-terms clause unenforceable where original agreement contained no dispute resolution terms); *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 575 (Fla. Dist. Ct. App. 1999) (holding a unilaterally imposed arbitration agreement unconscionable despite language in consumer's original cell phone contract permitting modifications on ten days' notice); *DirecTV, Inc. v. Mattingly*, 829 A.2d 626, 634–635 (Md. 2003) (holding the addition of an arbitration clause in a television subscription contract introduced via a change-of-terms provision unenforceable because no explanatory correspondence of the change was provided with the modified contract); *Kortum-Managhan v. Herbergers NBGL*, 204 P.3d 693, 700–01 (Mont. 2009) (determining that "bill staffer" arbitration agreement imposed pursuant to a credit card change-of-terms clause was unenforceable because consumer did not receive sufficient notice of the change); *Alces & Greenfield*, *supra* note 342, at 1130–45 (arguing that change-of-terms clauses should not be enforced beyond the reasonable expectations of the consumer because they are unconscionable and contrary to the duty of good faith); *Bar-Gill & Davis*, *supra* note 342, at 3 (recommending the use of Change Approval Boards to police unilateral modifications in consumer contracts); *Horton*, *supra* note 294, at 665 (arguing that change-of-terms provisions should not be enforced insofar as they permit unilateral substitution of provider's preferred terms over market-approved terms); Eric Andrew Horowitz, *An Analysis of Change-of-Terms Provisions as Used in Consumer Service Contracts of Adhesion*, 15 U. MIAMI BUS. L. REV. 75, 111–12 (2006) (arguing that change-of-terms clauses in contracts should be either enforceable or severely limited under the doctrines of reasonable expectations, unconscionability, and good faith and fair dealing); Daniel Watkins, *Terms Subject to Change: Assent and Unconscionability in Contracts That Contemplate Amendment*, 31 CARDOZO L. REV. 545, 549–50 (2009) (arguing that change-of-terms clauses should only be enforced with "heightened" notice and assent).

³⁵⁹ *See Bar-Gill & Davis*, *supra* note 342, at 43–45 (drawing an analogy between consumer-service provider and employer-employee relationships).

³⁶⁰ The wide variety of contract principles that have been invoked in such analyses includes assent, contract interpretation, good faith, and unconscionability. *See Horton*, *supra* note 294, at 623–29 (discussing various judicial approaches to change-of-terms cases).

holders' accounts at any time, did not contemplate the introduction of an arbitration policy where the original agreement contained no dispute resolution terms.³⁶¹ The court justified its analysis in part by reference to the implied duty of good faith, concluding that a provider does not act in an objectively reasonable manner consistent with that duty when it seeks to add an entirely new term not within the contemplation of the parties at contract formation.³⁶² To conclude otherwise, said the court, would open the door to the claim that the original agreements were illusory.³⁶³

Courts assessing consumer change-of-terms clauses have also been influenced by the degree to which the drafter's modification process allows consumers to opt out of the change. Thus, several decisions have enforced unilateral changes where the issuer or service provider gave the consumer advance warning of the new terms and the opportunity to reject them.³⁶⁴ Such decisions are consistent with the idea previously advanced with respect to employer change-of-terms provisions—that although employers

³⁶¹ *Badie*, 79 Cal. Rptr. 2d at 277–78. The agreements went on to state that the bank would provide notice in advance “to the extent required by law,” presumably referring to state statutory law. *Id.* Several states have laws requiring lenders to provide advance notice of changes in account terms. See Horton, *supra* note 294, at 625 n.131 (citing ALA. CODE § 5-20-5 (1996); DEL. CODE ANN. tit. 5, § 952(a) (2001); FLA. STAT. ANN. § 658.995(4) (West 2004); GA. CODE ANN. § 7-5-4(c) (2004); IOWA CODE ANN. § 537.3205(1) (West 1997); KAN. STAT. ANN. § 16a-3-204(2)-(3)(b) (2007); ME. REV. STAT. ANN. tit. 9-A, § 3-204(2) (1999); NEV. REV. STAT. ANN. § 97A.140(4) (LexisNexis 2007); N.D. CENT. CODE § 51-14-02 (2007); OHIO REV. CODE ANN. § 1109.20(D) (West Supp. 2009); R.I. GEN. LAWS § 6-26.1-11(a) (Supp. 2008); S.D. CODIFIED LAWS § 54-11-10 (2006); TENN. CODE ANN. § 45-2-1907(a) (2007); UTAH CODE ANN. § 70C-4-102(2)(b) (Supp. 2008); VA. CODE ANN. § 6.1-330.63(D) (Supp. 2009) (cataloguing state statutes that require notice)). Federal law now requires advance notice for all credit card accounts. See 15 U.S.C. § 1637; *supra* note 342 and accompanying text (discussing the CARD Act). The implication of the change-of-terms provision, however, is that advance notice is not required under the contract.

³⁶² *Badie*, 79 Cal. Rptr. 2d at 284–85; see also *Sears Roebuck & Co. v. Avery*, 593 S.E.2d 424, 431 (N.C. App. Ct. 2004) (concluding, in applying Arizona law, that an issuer's ability to unilaterally modify through a change-of-terms provision is “not consistent with good faith and is not within the reasonable expectations of cardholders”). But see *Hutcherson v. Sears Roebuck & Co.*, 793 N.E.2d 886, 899–900 (Ill. App. Ct. 2003) (rejecting the notion in *Badie* that the covenant of good faith and fair dealing precludes addition of an arbitration provision).

³⁶³ *Badie*, 79 Cal. Rptr. 2d at 284–85; see also *Stone v. Golden Wexler & Sarnese, P.C.*, 341 F. Supp. 2d 189, 198 (E.D.N.Y. 2004) (noting in refusing to allow bank to add arbitration clause to consumer credit agreement that “[t]o hold otherwise would permit the Bank to add terms . . . without limitation as to [their] substance or nature”); *Avery*, 593 S.E.2d at 432 (concluding that the “power to unilaterally amend contractual provisions without limitation gives rise to an illusory contract”).

³⁶⁴ See *Beneficial Nat'l Bank v. Payton*, 214 F. Supp. 2d 679, 683–684, 691 (S.D. Miss. 2001) (enforcing an arbitration clause introduced via amendment to a credit agreement containing a change-of-terms clause where the issuer gave one month's advance warning and the option to reject the arbitration clause by written notice); *Coates*, 125 F. Supp. 2d at 826, 836 (same); *Stiles v. Home Cable Concepts, Inc.*, 994 F. Supp. 1410, 1412–14, 1418 (M.D. Ala. 1998) (same, where consumer received two months' advance warning).

have the right to alter terms of employment unilaterally, they cannot contract away the obligation to provide at least reasonable advance notice of their desired change.³⁶⁵ In other words, drafting parties cannot retain both unlimited substantive discretion and unlimited procedural discretion. At a minimum, advance notice must be provided.

Lawmakers appear to share this view. Although the case law on consumer change-of-terms clauses remains in conflict, legislation on credit card plans now precludes unilateral changes of key terms absent advance notice. The federal CARD Act requires credit card issuers to provide forty-five days' advance notice of significant changes of terms, such as increases in annual percentage rate, fees, and finance charges.³⁶⁶ Various state laws similarly require advance notice by issuers of revolving credit plans.³⁶⁷ Commentators too have spoken uniformly in condemning consumer change-of-terms clauses. Their concerns have been framed largely in economic terms and have not specifically singled out the problem of waivers of advance notice.³⁶⁸ Nevertheless, making advance notice mandatory can help reduce some of the economic inefficiencies that change-of-terms clause are likely to occasion. When consumers, as well as employees, have advance notice, they have a greater ability and incentive to compare proposed terms with those of other providers or employers, reducing the likelihood that drafters will be able to insist on overreaching terms.

To be sure, the law in the consumer arena is not completely supportive of the argument advanced here. At least some case law could support the conclusion that an issuer or provider might be able to unilaterally change terms without any notice if that power is expressly reserved.³⁶⁹ Nor is the consumer context wholly analogous to employment. Yet, the differences between the two contexts suggest that employer change-of-terms provisions should be subject to even greater scrutiny than those found in consumer agreements. Although changes to consumer agreements can create unfair

³⁶⁵ See *supra* notes 263–295 and accompanying text.

³⁶⁶ 15 U.S.C. § 1637(i)(1)–(2); see Alces & Greenfield, *supra* note 342, at 1128 (noting CARD Act's affect on the law of unilateral modifications); Bar-Gill & Davis, *supra* note 342, at 5–6 (same). As part of the required notice, the issuer must notify the consumer of the ability to terminate the card before the effective date. See 15 U.S.C. § 1637(i)(3).

³⁶⁷ See Horton, *supra* note 294, at 625 n.131.

³⁶⁸ See, e.g., Bar-Gill & Davis, *supra* note 342, at 6 (“[S]ellers’ unchecked power to modify contracts prevents the efficient operation of markets for consumer products. Comparison shopping becomes meaningless when the product or contract can be changed easily soon after the purchase is complete.”); Horton, *supra* note 294, at 609 (arguing that unilateral revisions are inefficient because “no rational adherent would spend the time and energy necessary to shop for terms that the drafter can freely change”).

³⁶⁹ See *Herrington v. Union Planters Bank*, 113 F. Supp. 2d 1026, 1035 (S.D. Miss. 2000) (holding an arbitration agreement added to a deposit account agreement via a change-of-terms clause enforceable where no advance notice was given).

surprise and have economic consequences, they affect a discrete area of a consumer's finances and their impact can be limited by diversification. Creditworthy consumers can hold multiple credit cards, hedging the possibility that one issuer might alter its terms unfavorably. In many cases, consumers are also capable of finding replacement providers with minimal transaction costs.³⁷⁰ By contrast, employees hold only one full-time job at a time, which often comprises their sole source of income. Changes in terms affect their entire livelihood, and the risks of exit in seeking alternate work are enormous.³⁷¹

In sum, there are sound reasons to deny enforcement of employer change-of-term clauses. Even if employers can contractually reserve the right to modify, they should not be permitted to wholly eliminate the obligation to provide advance notice or contractually reduce notice to an unreasonable amount. Legislative and judicial treatment of consumer service agreements provide further support for this conclusion. Allowing employers to contract for the right to indiscriminately change terms without conforming to the minimal procedural obligation to provide reasonable notice would do an injustice to foundational contract principles and undermine the duty of good faith.

D. Promises of Job Security and the Special Case of Employee Handbooks

A final question posed by the reasonable notice rule is whether in some cases mere compliance with a notice requirement, however much the employer provides, might not be sufficient to effect a binding mid-term modification. As discussed previously, the unilateral modification approach currently espoused by courts, whether or not advance notice is considered a requirement, is premised on the at-will status of the parties' relationship.³⁷² It is only because employers are free to terminate workers for any or no rea-

³⁷⁰ Of course, there may be little use in searching for favorable terms when they can be unilaterally changed. See Horton, *supra* note 294, at 609 (describing the economic inefficiencies change-of-terms provisions generate for consumers).

³⁷¹ The author has elsewhere described the more onerous effect of unilaterally imposed terms on employees, as compared to consumers, in the context of employer-drafted terms introduced subsequent to the employee's acceptance of employment and upon the start of performance. See Arnow-Richman, *Worker Mobility*, *supra* note 4, at 980 (asserting that unlike consumers who can return or reject a product in response to unfavorable terms, employees have very limited ability to "return" a job after incurring the start up costs of beginning employment); Arnow-Richman, *Cubewrap Contracts*, *supra* note 2, at 653 (noting that the obstacles to consumer rejection of changes in terms "are all the more burdensome in the employment context, where the employee has already invested financially and emotionally in what he or she expects to be a reliable means of earning a living").

³⁷² See, e.g., *Baldonado v. Wynn Las Vegas, LLC*, 194 P.3d 96, 105–06 (Nev. 2008) ("[W]e recognized that at-will employees have no contractual rights arising from the employment relationship that limit the employer's ability to prospectively hire and fire employees, and to change the terms of employment." (footnote omitted)); *supra* notes 104–133 and accompanying text.

son that they can introduce new terms at their election. It therefore follows that if an employer has contractually altered the at-will relationship by granting just cause protection to its workforce, the employer is no longer at liberty to make unilateral changes.

This reasoning suggests that the unilateral modification plus notice approach may be inapplicable to mid-term modifications of employee handbooks containing job security promises.³⁷³ Absent a legitimate reason to terminate workers pursuant to the extent policy, the employer would have to convince its workforce to give up whatever benefit it wished to withdraw.³⁷⁴ If that benefit is the job security provision itself, one would expect employees to be particularly recalcitrant. From this perspective, the minority jurisdictions favoring the formal modification approach to handbooks appear to have gotten it right. Indeed, one would not expect an employee to sacrifice job security absent a return promise of real value.

A complicating consideration, however, is the scope and duration of the original promise. Most reported decisions assessing the validity of a mid-term modification of an employee handbook presume that the challenged modification retracts a contractually-binding promise of just-cause protection.³⁷⁵ The facts, however, are not always so clear. For instance, in *Demasse v. ITT Corp.*, the 1999 Arizona Supreme Court decision, the handbook provision at issue required layoffs to be conducted in reverse seniority order (“last in first out”).³⁷⁶ The disputed modification replaced this seniority policy with a performance-based layoff procedure.³⁷⁷ In adopting the formal modification approach, the court presumed that the original manual containing the seniority policy “offer[ed] a term of job security,” such that the plaintiffs’ employment relationship was no longer at will.³⁷⁸ There is a

³⁷³ See Walters, *supra* note 105, at 410–11.

³⁷⁴ See *id.*

³⁷⁵ This owes to the procedural posture of most cases. Reported decisions regarding the effectiveness of a mid-term handbook modification have generally been issued either on certified question or on an employer’s motion for summary judgment. See, e.g., *Demasse*, 984 P.2d at 1141 (“The questions certified posit that the layoff seniority provision has become part of the employment contract. Using this assumption, we respond to each question in the negative.” (citation omitted)); *Bankey*, 443 N.W.2d at 120–21 (“We emphasize that our answer today is necessarily limited by the wording of the certified question which asks whether an employer under the circumstances set forth may unilaterally change from a discharge-for-cause to an employment-at-will policy.”).

³⁷⁶ 984 P.2d at 1141 (“The earliest version provided simply that layoffs within each job classification would be made in reverse order of seniority. Later versions also gave more senior employees the ability to ‘bump’ less senior employees.”).

³⁷⁷ *Id.* (“Four years passed before ITT notified its hourly employees [that] its layoff guidelines for hourly employees would not be based on seniority but on each employee’s ‘abilities and documentation of performance.’”).

³⁷⁸ *Id.* at 1143 (“When employment circumstances offer a term of job security to an employee who might otherwise be dischargeable at will and the employee acts in response to that promise,

difference, however, between a promise that employees will not be terminated—whether for a fixed period of time or absent a particular justification—and a promise that termination, if it occurs, will be conducted pursuant to specified procedures and cushioned by certain benefits.³⁷⁹ Although the former might preclude a unilateral modification, the latter arguably would not.

Even if an employer's policy explicitly confers job security of the type presumed in *Demasse*, there still remains the question how long that policy is intended to endure. Courts and commentators espousing the unilateral modification plus notice approach implicitly assume that the original policy was intended to be of limited duration, whereas those rejecting the approach assume the policy was to endure indefinitely. But, once again, this question turns on the facts. In *Asmus*, for instance, the scope and intent of the original policy was clear.³⁸⁰ It stated that the employer would "offer all management employees . . . employment security through reassignment . . . and retraining . . . even if their present jobs are eliminated."³⁸¹ But the policy also explicitly stated that it would not endure indefinitely. It was to "be maintained so long as there is no change that would materially affect Pacific Bell's business plan achievement."³⁸²

In *Asmus*, the court did not determine whether a material change justified Pacific Bell's retraction of its plan.³⁸³ For purposes of summary judgment, the employer conceded that no such event had occurred, arguing that it had the right to modify the policy as a matter of law regardless of its intended duration.³⁸⁴ This was a key point of departure for the dissenting justices, who took the majority to task for treating the employer's job security

the employment relationship is *no longer at will* but is instead governed by the terms of the contract.")

³⁷⁹ See *id.* at 1154 (Jones, J., concurring in part and dissenting in part) (contending that the existence of a contractually binding reverse seniority policy "does not catapult the case beyond the reach of at-will employment principles").

³⁸⁰ 999 P.2d at 73.

³⁸¹ *Id.* The policy was not only explicit but also exceptionally expansive in that it "offer[ed]" security even in the event of job elimination. See *id.* A simple just-cause policy would merely protect employees from arbitrary termination, but it would not protect employees in the event of a legitimate business justification for reducing employment. See generally RESTATEMENT OF EMP'T LAW § 2.04 ("[A]n employer has a ground for terminating an agreement for an indefinite term of employment requiring cause for termination when a significant change in the employer's economic circumstances means that the employer no longer has a business need for the employee's services.").

³⁸² *Id.* (emphasis omitted).

³⁸³ The parties stipulated that Pacific Bell would not present evidence on the issue. *Id.* at 74.

³⁸⁴ As the dissent put it: "Pacific Bell asserted that it has a right to cancel the MESP unilaterally, notwithstanding the specification of an express condition for rescission of the MESP. . . . This clause, Pacific Bell contended, did not limit its right to modify unilaterally either the policy or its duration provision." *Id.* at 83–84 (George, C.J., dissenting).

policy as an indefinite contract with no specified duration.³⁸⁵ The dissent would not only have adopted a formal modification approach to mid-term modifications generally, it would have treated the material change clause of Pacific Bell's policy as a condition for retraction and any attempt to modify the policy in advance of such an event a contractual breach.³⁸⁶ Considering the facts from this perspective, even if the majority correctly articulated the appropriate rule for most run-of-the-mill modifications, *Asmus* itself may have been wrongly decided.

In sum, there may be circumstances that justify more aggressive limitation of employer modification rights than the reasonable notice rule advanced in this Article. Where an employer has made a binding, long-term commitment to ongoing job security for the duration of the employment relationship, a formal modification rule appears to be correct. But such situations are probably the exception rather than the rule. Few employers are likely to fully relinquish their termination rights for all time; the question is whether employees examining their policies could reasonably believe that they had.³⁸⁷ The upshot is that there can be no categorical rule as to whether the reasonable notice approach applies to the modification of handbook job

³⁸⁵ *Id.* at 85 (“Contrary to Pacific Bell’s contention and the majority’s conclusion, the MESP is a contract for a definite duration. Therefore, Pacific Bell may not terminate the MESP unilaterally before the event defining its duration has occurred.”).

³⁸⁶ *Id.* (“I would conclude that an employer may not unilaterally modify or rescind an unconditional job security policy, lacking an express duration provision, that has become part of the employment contract, without providing additional consideration and obtaining the employee’s assent.”). The dissent further asserted,

To the extent it is unclear how the occurrence of a change materially affecting Pacific Bell’s business plan achievement can be ascertained or measured, we must conclude the condition reasonably may be ascertained by reference to its purpose. Pacific Bell has chosen not to present evidence that the condition occurred Therefore, Pacific Bell could not terminate the MESP unilaterally without breaching the contract.

Id. at 88 (citations omitted).

³⁸⁷ See *id.* at 75 (majority opinion) (“[T]he trier of fact can infer an agreement to limit grounds for an employee’s termination based on the employee’s reasonable reliance on company policy manuals.” (citing *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988))); *Duldulao v. Saint Mary of Nazareth Hosp. Ctr.*, 505 N.E.2d 314, 318 (Ill. 1987) (“[W]e hold that an employee handbook or other policy statement creates enforceable contractual rights if . . . [f]irst, the language . . . contain[s] a promise clear enough than an employee would reasonably believe than an offer has been made.”); *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880, 884 (Mich. 1980) (“[A]n employee’s legitimate expectations grounded in an employer’s written policy statements have been held to give rise to an enforceable contract.”); *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1264 (N.J.) (“[W]e conclude that when an employer of a substantial number of employees circulates a manual that, when fairly read, provides that certain benefits are an incident of the employment . . . the judiciary . . . should construe them in accordance with the reasonable expectations of the employees.” (citations omitted)), *modified*, 499 A.2d 515 (N.J. 1985).

security policies. In most cases, employers will have to litigate this issue, and rightly so, given their decision to disseminate the original policy and the benefits they doubtlessly derived from it while it was in effect.³⁸⁸

CONCLUSION

This Article has argued for the adoption of a unilateral modification plus reasonable notice approach as the universal rule for determining the enforceability of mid-term modifications of at-will employment contracts. Currently, courts focus on the presence or absence of consideration, an inquiry grounded in outdated rules that ignores the policy considerations underlying mainstream modification law. Parties should have the flexibility to adjust the terms of their relationship, but the resulting modification should be the product of agreement, not coercion. At-will employees, faced with the immediate threat of termination, have no choice but to accept a proposed modification, irrespective of whether they receive a benefit in supposed consideration for the change. Moreover, to the extent any such benefit is contingent on continued employment, it is as illusory as the employment itself.

The better approach, as articulated by courts in the handbook modification context, is to permit unilateral modification only where the employer provides reasonable advance notice of the change in terms. This rule has intuitive appeal as a compromise position, but thus far has not been adequately justified as a matter of doctrine or policy. This Article does both, grounding reasonable notice in the law of good faith modifications and demonstrating how reasonable notice satisfies the formal requirement of consideration. In so doing, it presents a meaningful benchmark for determining whether notice is reasonable—the amount of time necessary for an employee to realistically consider alternate employment. To be sure, reasonable notice will not level the playing field for at-will employees whose terms of employment remain subject to employer discretion. It will, however, better position them to make use of the limited bargaining power they have, particularly their right to walk away.

³⁸⁸ Cf. *Woolley*, 491 A.2d at 1271 (“All that this opinion requires of an employer is that it be fair. It would be unfair to allow an employer to distribute a policy manual that makes the workforce believe that certain promises have been made and then to allow the employer to renege on those promises.”).