At What Price Silence: Are Confidentiality Agreements Enforceable?

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I. INTRODUCTION

Employees routinely sign confidentiality agreements, promising not to disclose employer confidential information. The ostensible purpose of a confidentiality agreement is to prevent unfair competition from the employer's competitors. The employer may have legitimately relied on a confidentiality agreement to safeguard its market share. Often the employer has
expended significant time and money in developing the information; however, the nature of confidential information is that once the information is leaked, confidentiality is forever lost.

By the same token, an umbrella confidentiality agreement may very well safeguard information crucial to public health or safety. The silence of the employee is bought without review of the agreement by a neutral third party. A confidentiality agreement purporting to cover public health or safety risks or illegal acts may satisfy the employer's needs, but not the needs of the employee nor the needs of society. To whom does the employee/citizen owe allegiance in that situation? When is the employee's and society's interest in revealing information superior to the employer's interest in confidentiality? Should the employee blow the whistle or remain silent?

Jeffrey Wigand ("Wigand") served as Brown and Williamson Tobacco Corporation's ("B&W") vice president for research and development from January 1989 until March 24, 1993, when B&W fired him. From 1994 to 1996, Wigand blew the whistle on B&W, thereby allegedly violating a number of confidentiality agreements he had with B&W.

The decision that Wigand made to blow the whistle on B&W could have far-reaching consequences. Wigand was the highest ranking tobacco executive to blow the whistle on the tobacco industry, and his former status with B&W lent credibility to his

4. See Alix M. Freedman & Suein L. Hwang, Leaders of the Pact: How Seven Individuals with Diverse Motives Halted Tobacco's Wars; One Tailored the Lawsuits, Another Woke the FDA; Dick Morris Came to Play, WALL ST. J., July 11, 1997, at A1.
5. See infra notes 400-02 and accompanying text.
6. See Chip Jones & Peter Hardin, His Public Stand Has Private Consequences, RICHMOND TIMES-DISPATCH, Mar. 31, 1996, at A1. Other lesser-ranking former tobacco company employees have also come forward. See id. These whistle
disclosures.\textsuperscript{7} He used his expertise to analyze leaked documents

\textbf{Merrell Williams,} a former paralegal who worked at a law firm representing B&W previously leaked numerous B&W documents. \textit{See id.} On May 12, 1994, University of California at San Francisco Professor of Medicine Stanton Glantz received a Federal Express package containing 4,000 pages of confidential B&W documents from "Mr. Butts." \textit{See Sheryl Stolberg, Tobacco Tactics-How an Anti-Tobacco Activist Became a Target-The Saga of Stan Glantz is Emblematic of How Tobacco Giants Try to Squelch Their Opponents,} STAR TRIB. (Minneapolis-St. Paul), Apr. 16, 1996, at 9A. Glantz delivered the papers to the tobacco archive of the UCSF library. \textit{See id.} On February 3, 1995, the UCSF librarian received a letter from a B&W attorney requesting the return of the papers. \textit{See id.} B&W posted individuals outside the tobacco archive "to keep watch on our papers because our view was the documents were stolen and we didn't want them disappearing from the library the same way they disappeared from our building." \textit{Id.} B&W filed suit against the university requesting the return of the papers and requesting the names of persons who had viewed them. \textit{See id.} The documents began to be posted on the Internet on July 1, 1995 after the California Supreme Court ruled that they should be open to the public. \textit{See Joe Ward, Internet Users Getting a Look at B&W's Papers, COURIER-J.} (Louisville), July 6, 1995, at 8B.

B&W believes the documents Glantz received came directly or indirectly from Williams. \textit{See Greg Otolski, Papers in B&W Flap Available in California, COURIER-J.} (Louisville), Feb. 8, 1995, at 8B. Williams made copies of B&W documents and provided the copies to Richard Scruggs in April 1994. \textit{See Andrew Wolfson, Judge Will Try to Clear Smoke Surrounding Stolen Legal Papers, COURIER-J.} (Louisville), Dec. 1, 1993, at 1A. Scruggs, special counsel to the state of Mississippi in its lawsuit against the tobacco companies, and Mississippi Attorney General Mike Moore provided the documents to Representative Henry Waxman. \textit{See Chris Burritt & Jim Yardley, Around the South: Tobacco Company Attacks Ethics of 2 Whistleblowers, ATLANTA J. & CONST., May 1, 1996, at C1.} In April 1994, Waxman chaired the House of Representatives Health and Environment Subcommittee that held hearings on the tobacco industry. \textit{See Mike Brown, Companies "Lied" About Nicotine, Lawmaker Says; Cigarette Firms Identify Additives, COURIER-J.} (Louisville), Apr. 14, 1994, at 1A. Waxman claimed that cigarettes are drugs which should be regulated by the FDA. \textit{See id.}

\textbf{Jeff Wigand} is different from other witnesses in past tobacco cases, because he is highly respected, he worked directly on sensitive projects, his memory is recent and the work was done in the United States... The only thing I can compare this to is the first time high-ranking members in the Mafia came out and testified against the mob.

\textbf{Id.} \textit{A Vanity Fair} article opined, "Wigand is the most sophisticated source who has ever come forward from the tobacco industry, a fact which has motivated B&W to mount a multi-million-dollar campaign to destroy him." Brenner, \textit{supra} note 2, at
and to educate \textit{60 Minutes}, ABC News, and the Food and Drug Administration ("FDA").\textsuperscript{8} Some believe that his disclosures served as a catalyst to mobilize anti-tobacco forces and hasten legal liability for the tobacco industry.\textsuperscript{9}

\begin{itemize}
\item \textsuperscript{8} See Brenner, \textit{supra} note 2, at 179-81. In early spring 1993, someone had left a crate of Philip Morris internal documents on Lowell Bergman’s doorstep. See id. Bergman, \textit{60 Minutes} producer, asked Wigand to analyze the leaked documents, and \textit{60 Minutes} paid Wigand $12,000 for his work. See \textit{60 Minutes}, \textit{supra} note 3. Wigand also advised the Food & Drug Administration ("FDA") on cigarette chemistry and reportedly advised David Kessler, former head of the FDA, about "ammonia additives and nicotine-boosting." \textit{Id.} Further, Wigand advised ABC News attorneys defending a ten billion dollar lawsuit brought by Philip Morris. See Brenner, \textit{supra} note 2, at 206. Philip Morris has sued ABC News for a \textit{Day One} story that charged the tobacco companies "spiked" cigarettes with nicotine to keep smokers hooked. See Elizabeth Jensen & Eben Shapiro, \textit{Philip Morris Suit Against ABC News Seeks $10 Billion, Alleges Defamation}, \textit{WALL ST. J.}, Mar. 25, 1994, at B12; see also \textit{Day One} (ABC television broadcast, Feb. 28 & Mar. 7, 1994). He has also testified before three federal grand juries. See Henry Weinstein, \textit{Tobacco Whistle-blower’s Star is Rising: Award: An Industry Drive to Discredit Him and a Court Restraining Order Cannot Keep Jeffrey Wigand From Being Honored for ‘Moral Courage’}, \textit{L.A. TIMES}, Apr. 25, 1996, at 16.
\item \textsuperscript{9} See Hunt Helm, \textit{Blowing the Whistle on Big Tobacco: Wigand, Williams Lifted Secrecy’s Veil—Their Revelations Changed the History of the Tobacco Industry}, \textit{COURIER-J.} (Louisville), May, 25, 1997, at 1A. Scott Ballin, a former American Heart Association lobbyist, in referring to Wigand and Williams, stated, “These people stuck their necks out . . . . We’ve been dealing with this problem in this country for decades. What they did served as a catalyst, and now in the past couple of years things have moved very rapidly.” \textit{Id.} Richard Daynard, a Northeastern University professor of law who heads of The Tobacco Products Liability Project, commented:
\begin{quote}
What all of this did, was to provide tremendous grist for the process of successive revelations that we’ve had. I think the public began to experience this industry as an outlaw industry.
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Courts are beginning to take that view as well, except of course, in the state of Kentucky. This is a state where you can be enjoined (as Williams was) from speaking to your own lawyer because you’ve taken on a tobacco company. Kentucky is not a state where the normal rules are going to apply, and I think that makes both of these guys especially gutsy.
\end{itemize}

\textit{Id.}

Stanton A. Glantz, a University of California at San Francisco professor, stated:

Wigand did basically three things. He brought what was in the documents [leaked by Williams] into the present; the documents ended in the mid-1980s, and he showed that it was all still going on. The
In the past forty years, more than four hundred lawsuits have been filed against tobacco companies for smoking-related injuries. However, until a 1996 jury verdict in a Jacksonville, Florida case, none had been successful. On August 9, 1996, in the aforementioned case, Grady Carter, who had been treated for lung cancer, received a $750,000 jury verdict against B&W.

On May 23, 1994, Mississippi was the first state to sue the tobacco industry seeking reimbursement for Medicaid funds the state had spent to treat smoking-related health problems. Other states began to file similar suits. In July 1995, a federal grand jury in New York began to investigate the tobacco companies’ representations to federal regulators regarding the content and effect of cigarettes. A Washington D.C. federal grand jury was reportedly investigating whether tobacco company executives lied under oath when they testified in April 1994 before a House of Representatives subcommittee that they did not believe nicotine is second thing is, he put a human face on it. The stuff we did (based on the documents alone) is kind of dry reading. The third thing, the whole fracas with CBS backing down and all that, couldn’t be suppressed by the cigarette companies.

Id.

David Kessler, former FDA commissioner, noted, “There’s nothing improper about [cooperating with federal officials]. This is the moral high ground. No confidentiality agreement should prohibit people from cooperating with federal officials in the middle of an investigation.” Id.


11. See Ex-smoker With Cancer Awarded $750,000, supra note 10, at A8. The Jacksonville case was similar to the tobacco liability case described in John Grisham’s novel, THE RUNAWAY JURY, in which a jury returns a verdict against the tobacco industry. In fact, prospective jurors in the Jacksonville case were asked whether they had read THE RUNAWAY JURY. See Tobacco Giants Watch Liability Case Brought by Cancer-stricken Man, ORLANDO SENTINEL, July 31, 1996, at C6.


14. See Blowing the Whistle on Big Tobacco; A Chronology of the Smoking Wars, COURIER-J. (Louisville), May 25, 1997, at 12A.

15. See Philip Hilts, Tobacco Firms Face Criminal Probe of Testimony; Product Claims to be Examined, COURIER-J. (Louisville), July 26, 1995, at 1A.
addictive. On March 13, 1996, Brooke Group Ltd., owner of Liggett Group, agreed to settle with five states suing the tobacco industry. This was the first tobacco company to settle a smoking-related injury case.

In April 1997, a federal district court judge ruled that the FDA may regulate cigarettes as a drug. By early spring 1997, twenty-two states had sued the tobacco industry to recover Medicaid funds spent to treat tobacco-related medical problems; eighteen additional states had sued the tobacco industry by June 20, 1997. On June 20, 1997, representatives of the suing states and the tobacco industry announced a historic $368 billion settlement. On July 3, 1997, Mississippi settled its lawsuit against the tobacco industry for over three billion dollars and received its first payment of $170 million on July 15, 1997. The lawsuit had been scheduled

18. See id. In April 1996, Texas, West Virginia, Florida, Massachusetts, and Louisiana each were paid $200,000 in the Liggett settlement. See Joe Ward, More States Attack Tobacco With Lawsuits, COURIER-J. (Louisville), Apr. 13, 1996, at 1A. Liggett will pay those five states four billion dollars over nine years and 2.5 percent of Liggett profits for 25 years. Minnesota did not participate in this settlement. See id.
20. See Mary Dieter, Indiana Attorney General Looks Back at Talks, Ahead to His Role, COURIER-J. (Louisville), June 22, 1997, at 12A.

Under the settlement, B&W will dismiss its lawsuit against Wigand; Wigand will be released from his confidentiality agreement on March 20, 1998, if Congress approves the settlement by that date, or upon later congressional approval, but Wigand still is restricted from disclosing trade secrets. Industry Whistle-blower "Relieved," ARIZ. REPUBLIC, June 21, 1997, at A19; Kim Wessel, B&W Dismisses Lawsuit Against Wigand; Ex-executive Still Has Confidentiality Deal, COURIER-J. (Louisville), Aug. 1, 1997, at 3B.
22. See Tobacco Industry Cuts Deal; The State of Mississippi Will Receive $3.6 Billion Even if the Historic National Settlement is Not Approved by Congress, ORLANDO SENTINEL.
to go to trial the week following the settlement. In August 25, 1997, Florida settled its lawsuit against the tobacco industry for over eleven billion dollars. On August 29, 1997, Georgia finally sued the tobacco industry to recoup Medicaid costs the state paid to treat tobacco-related health problems. On October 10, 1997, the tobacco industry settled a class action lawsuit filed on behalf of 60,000 flight attendants. The lawsuit had claimed adverse health effects were caused by secondhand smoke they were exposed to while working on airliners.

In Part II, this article reviews the law concerning confidential information, state cases involving confidentiality agreements, and federal cases illustrating the conflict between a confidentiality agreement and information necessary under a federal statute. Part III discusses whistleblowing, whistleblowing statutes and cases, and Wigand as a whistleblower. Finally, in Part IV, the article suggests a public policy exception to confidentiality agreements.

II. CONFIDENTIALITY

A. Confidential Information

In the course of an employment relationship, the employer may disclose trade secrets or other confidential information to the employee. So long as the information is proprietary to the

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27. See id. In a landmark agreement, on May 8, 1998, the state of Minnesota and Blue Cross and Blue Shield of Minnesota reached a multibillion dollar settlement with tobacco companies. See Minnesota: Tobacco Industry Settles Lawsuit with State, Blue Cross/Blue Shield, BNA HEALTH CARE DAILY, May 11, 1998, at d5. The settlement was for reimbursement for money spent on health care for those harmed by tobacco. See id. The industry will pay the state $6.1 billion over the next 25 years. See id. Texas settled its lawsuit with the tobacco industry for $15.3 billion. See id. Texas was the third state, and Minnesota the fourth, to settle suits to recover the costs of treating tobacco-related health problems. See id. The other two states are Florida and Mississippi. See id.

28. See RESTATEMENT (SECOND) OF AGENCY § 395 cmt. b (1958). A wide range of information is protected, including "unique business methods of the employer,
employer, is revealed in confidence, and is not of general knowledge, the employee has a common law duty to the employer to safeguard the employer’s information. The duty generally continues after the employment relationship ends, however, the information must concern specific information rather than general skill or know-how.

trade secrets, lists of names, and all other matters which are peculiarly known in the employer’s business.” Id. A Florida court recognized a company’s price list containing the company’s mark-up as confidential information. See Thomas v. Alloy Fasteners, Inc., 664 So. 2d 59, 60 (Fla. Dist. Ct. App. 1995). A New York court found that customer lists containing “information involving customer coverage, premium amounts, cash values, and loans against existing policies” were confidential information. See John Hancock Mut. Life Ins. Co. v. Austin, 916 F. Supp. 158, 165 (N.D.N.Y. 1996).

29. See Home Gas Corp. v. Deblois Oil Co., 691 F. Supp. 567, 574 (D.R.I. 1987). The Rhode Island court stated that whether information is confidential “generally depends upon how readily ascertainable the information is for a person conducting an independent investigation.” Id. A New York court found that a former employee did not breach his confidentiality agreement because the allegedly confidential information was publicly available. See International Paper Co. v. Suwyn, 966 F. Supp. 246, 259 (S.D.N.Y. 1997) (“[T]he businesses at issue... are comparatively low-technology industries, and Suwyn’s work at International Paper was driven by general managerial expertise as opposed to the application of highly technical, proprietary, or secret information.”).


Unless otherwise agreed, an agent is subject to a duty to the principal not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency or in violation of his duties as agent, in competition with or to the injury of the principal, on his own account or on behalf of another, although such information does not relate to the transaction in which he is then employed, unless the information is a matter of general knowledge.


31. See RESTATEMENT (SECOND) OF AGENCY § 396 (1958). Unless the employee has entered into a non-competition agreement, the employee may compete with the former employer. See id. However, the employee may not use the former employer’s trade secrets and confidential information. See id. cmts. a & b.


http://open.mitchellhamline.edu/wmlr/vol25/iss2/14
The interests reflected in the employee's duty of confidentiality are: (1) the public's interest in ensuring commercial morality; (2) the employer's interest in freely communicating information to an employee, but at the same time protecting information gained through significant expenditure; and (3) the employee's interest in gainful employment. The three interests must be balanced against each other; a confidentiality agreement may be unenforceable if public policy or the employee's interest outweighs the interest of the employer. The employer's competitor who hires the employee away should not be unjustly enriched by pirating confidential information that the employee has the duty to keep confidential. A competitor allowed access to confidential information might be able to undersell the employer. Fear of easily losing information derived from costly research and development might stifle an employer's desire to develop new technology. The employee may be valuable because of the employee's skill and knowledge in a particular field. If the employee was unfairly competing against his former employer because the employee had been extensively trained by his employer and because that extensive training consisted largely of confidential and proprietary information. See Picker Int'l, Inc. v. Blanton, 756 F. Supp. 971, 979 (N.D. Tex. 1990).


34. See Ingersoll-Rand Co. v. Ciavatta, 542 A.2d 879, 892 (N.J. 1988)

35. See id.

36. See id. at 894. The court in Ciavatta noted:

[T]he public has a clear interest in safeguarding fair commercial practices and in protecting employers from theft or piracy of trade secrets, confidential information, or, more generally, knowledge and technique in which the employer may be said to have a proprietary interest. The public has an equally clear and strong interest in fostering creativity and invention and in encouraging technological improvement and design enhancement of all goods in the marketplace.

Id. at 894-95.

In Follmer, Rudzewicz & Co. v. Kosco, the Michigan Supreme Court stated, "An agreement that unduly limits a former employee's freedom to go into business for himself or another, or extracts an excessive price for the privilege of doing so, is unreasonable and hence unenforceable." 362 N.W.2d 676, 684 (Mich. 1984).

37. See Apollo Techs. Corp. v. Centrosphere Indus. Corp., 805 F. Supp. 1157, 1193 (D.N.J. 1992) (applying New York law and finding that non-disclosure covenants in employment contracts are enforceable if the confidential information is not available from an independent source, and then only when it is necessary to protect the employer from unfair competition).

employee is not allowed to use the general skill and knowledge of the field, the employee may not be able to find work in the field and may suffer a loss of livelihood. 99

The common law protects trade secrets; the employee has a duty not to disclose the former employer's trade secrets given to the employee in confidence. 40 In addition, four-fifths of the states protect trade secrets through statute; forty-one states and the District of Columbia have adopted some variation of the Uniform Trade Secrets Act. 41 Confidential information not amounting to a

39. See North Am. Paper Co. v. Unterberger, 526 N.E.2d 621, 623-24 (Ill. App. Ct. 1988). This Illinois court held non-disclosure provisions of an employment agreement unreasonable and unenforceable because they were overbroad. See id. at 624. The court stated, "[T]he Agreement renders Unterberger virtually unemployable in his field of occupation as well as other related fields. Employment agreements which restrict an employee's ability to earn a living in his field of occupation throughout an unreasonable geographical area are against public policy and unenforceable." Id.


trade secret is a protectable interest under common law principles. Confidential information may also be protected under a confidentiality agreement between the employer and the employee.

Companies may well fear theft of trade secrets and confidential information. One industry group estimates losses due to intellectual property theft at twenty-four billion dollars annually. For example, the Federal Bureau of Investigation collected evidence that, over seven years, a senior research engineer at Avery Dennison Corporation allegedly sold in excess of fifty million dollars in company secrets to a Taiwanese competitor.


44. See Dean Starkman, Secrets and Lies: the Dual Career of a Corporate Spy, WALL ST. J., Oct. 29, 1997, at B1 (“[I]nstances of corporate spying are on the rise, spurred by increasingly tough global competition, a more mobile work force and the new premium placed on corporations’ intellectual property.”).
of Avery in return for payments totaling approximately $150,000.\(^{45}\) In June 1997, the engineer signed a plea agreement, confessing his guilt.\(^{46}\) Another incident involving alleged theft of trade secrets concerns Eastman Kodak Company. In August 1997, an engineer who retired from Kodak in 1992 pleaded guilty to one count of trade theft.\(^{47}\) The engineer had allegedly provided proprietary information to a Kodak competitor from 1993 to 1997.\(^{48}\) Kodak recently sued Minnesota Mining & Manufacturing and its former subsidiary, Imation, for trade secret theft in connection with Kodak secrets allegedly misappropriated by the former Kodak engineer.\(^{49}\) In August, 1997, IGENE Biotechnology, Incorporated sued Archers Daniels Midland ("ADM"), claiming a former IGENE employee gave IGENE trade secrets concerning production of astaxanthin in yeast cells to ADM.\(^{50}\)

The October 1997 United States Justice Department antitrust suit against Microsoft Corp. involves confidentiality agreements between Microsoft and its licensees.\(^{51}\) The suit alleges that the tying of Microsoft’s Windows 95 to Microsoft’s Internet browser

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45. See id.

46. See id. The Economic Espionage Act, passed in 1996, makes trade secret theft a federal felony. See id. Federal prosecutors brought the first three cases under the act in the summer of 1997. See id. Summarizing the cases, Starkman wrote:

In the PPG [Industries Inc.] case, two individuals pleaded guilty to trying to sell the chemical company's proprietary information to a rival. The Bristol-Myers Squibb [Co.] case involves an attempt by outsiders to bribe an employee for details about a drug. The Gillette [Co.] case centers on alleged theft by an outsider of trade secrets relating to a new shaving system.

Id.


48. See id.

49. See id.

50. See Lawsuit Brews Over Keeping Salmon Rosy: A Biotech Firm Claims an Ex-employee Leaked its Recipe for Tinting Fishery Salmon a Palatable Pink, ORLANDO SENTINEL, Aug. 31, 1997, at A12. Astaxanthin is a compound that gives wild salmon meat its distinctive color, which comes from crustaceans eaten by the salmon. See id. IGENE is hoping to break into the astaxanthin market now controlled by Hoffman-LaRoche by producing the compound in yeast cells. See id.

violates the terms of a 1995 consent decree and licensee confidentiality agreements are hampering the government's investigation by prohibiting licensees from disclosing information concerning license terms.

Where an employee leaves one company to work for a competitor, the first company has sued the competitor to prevent the former employee from disclosing confidential information to the competitor. In November 1997, Agfa, a unit of Germany's Bayer AG, sued General Electric Co. ("GE") to prevent a former Agfa vice president from disclosing Agfa customer and product development information to GE, an Agfa competitor and new employer of the former Agfa employee. A GE spokesperson stated that "upon hiring from a competitor, GE has a rigorous policy to insure that new employees understand their responsibility not to use or disclose confidential information of a former employer."

The enforceability of a confidentiality agreement is not uniform from state to state. Some states allow the confidentiality agreement to be enforced only if "reasonable." What is reasonable varies from state to state. Michigan, Georgia, Illinois, South Dakota, Pennsylvania, and Virginia require a confidentiality agreement to be reasonable. In contrast, a Texas court opined that non-disclosure provisions are not against public policy and "reasonable time, geographical, and scope-of-activity limitations are not prerequisites to enforceability."

In Michigan, a court must "scrutinize" a confidentiality agreement to determine whether "it goes beyond what is reasonably necessary for the protection of confidential information." Georgia interprets "reasonable" to require that the confidentiality agreement be written so that the non-disclosure provision is "reasonably related to the protection of the

54. *See id.*
56. *See infra* notes 58-70.
information” and the enforceability of the provision “turns on factors of time and the nature of the business interest sought to be protected.” Thus, a Georgia court is likely to strike down a confidentiality agreement either because it is of unlimited duration or because the information which the confidentiality agreement purports to protect is overbroad.

Illinois’ interpretation of “reasonable” is even more restrictive than that of Georgia. To determine whether the subject matter covered by the nondisclosure provision is reasonable, a court must consider three factors: “whether enforcement of the covenant will injure the public, whether enforcement will cause undue hardship to the promisor and whether the restraint imposed by the covenant is greater than is necessary to protect the interests of the employer.” In addition to requiring a reasonable time duration

60. Id. at 149. In Durham, the court acknowledged that customer lists and information might be protected under the contract in litigation but remanded for the trial court to determine “the legitimacy of the need to maintain the confidentiality of such information.” Id. at 150.
62. See Duracell Inc. v. SW Consultants, Inc., 126 F.R.D. 571, 575 (N.D. Ga. 1989); Prudential Ins. Co. v. Baum, 629 F. Supp. 466, 471 (N.D. Ga. 1986) (stating that the non-disclosure provision was overbroad); Equifax, 453 S.E.2d at 491; Sunstates Refrigerated Servs., Inc. v. Griffin, 449 S.E.2d 858, 860 (Ga. Ct. App. 1994) (holding a non-disclosure provision enforceable because it was reasonable as to time period covered and information protected); American Software USA, Inc. v. Moore, 448 S.E.2d 206, 209 (Ga. 1994) (holding a non-disclosure covenant properly limited to “trade secrets” and “confidential business information” not publicly available or properly learned from a third party); Kem Mfg. Corp. v. Sant, 355 S.E.2d 437, 443 (Ga. Ct. App. 1987) (holding that a jury must decide whether a non-disclosure provision is legitimately needed to protect the company’s confidential information); Lane Co. v. Taylor, 330 S.E.2d 112, 117 (Ga. Ct. App. 1985) (finding that referenced information in a non-disclosure covenant was not overly broad); Service Ctr., Inc. v. Minogue, 555 N.E.2d 1132, 1137 (Ill. App. Ct. 1989) (finding that the non-disclosure provision requiring the agent to keep secret information “concerning or in any way relating” to services offered was overbroad).
for non-disclosure, the non-disclosure must be reasonable in terms of the geographical area encompassed. South Dakota's interpretation of "reasonable" is similarly restrictive. In South Dakota, non-disclosure provisions "are strictly construed and enforced only to the extent reasonably necessary to protect the employer's interest in confidential information." The provisions are unenforceable "[I]f (1) a trade secret or confidential relationship does not exist, (2) the employer discloses the information to others not in a confidential relationship, or (3) it is legitimately discovered and openly used by others." In addition, the non-disclosure must be reasonable in duration and in geographical area covered. North Carolina and Pennsylvania require that the non-disclosure provision be limited in time and geography to safeguard employer confidential information no more than reasonably necessary.

Virginia uses a three-part test to determine the enforceability of a non-disclosure provision:

1. Is the restraint on circumvention no broader than is necessary, from the standpoint of the trade secret holder, to protect the holder from the disclosure of its

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(N.D. Ill. 1989); Telxon Corp. v. Hoffman, 720 F. Supp. 657, 666 (N.D. Ill. 1989) (holding that lack of time limitations on a non-disclosure provision is "problematic"); Perman v. Arcventures, Inc., 554 N.E.2d 982, 986 (Ill. App. Ct. 1990) (holding that a confidentiality agreement was unenforceable where it did not contain a limitation on duration or geographical scope); Disher v. Fulgoni, 464 N.E.2d 639, 643 (Ill. App. Ct. 1984) (finding that confidentiality agreements should be subject to "careful scrutiny").

64. See Tower Oil, 425 N.E.2d at 1065.
66. Id.
67. See id. at 56. In Walling Chemical Co. v. Bigner, the court reviewed a non-disclosure provision under the three part test of Rezatto and under the time and geographical limitations suggested in Rezatto before finding the provision reasonable. 349 N.W.2d 647, 650 (S.D. 1984).
68. See Henry Hope X-Ray Prod., Inc. v. Marron Carrel, Inc., 674 F.2d 1336, 1342 (9th Cir. 1982); Electrical South, Inc. v. Lewis, 385 S.E.2d 352, 355 (N.C. Ct. App. 1989). In Henry Hope, the court found that the non-disclosure provisions were reasonable even without time and geographical limitations. See Henry Hope, 674 F.2d at 1342. The time limitation was implicit because the non-disclosure provisions covered only "confidential" information. See id. Thus, when information became public, it would no longer be subject to the non-disclosure provisions. See id. No express geographical limitation was necessary because Henry Hope had international sales. See id.
confidential information?

2. From the standpoint of the party who received the confidential information, is the restraint reasonable in the sense that it is not unduly harsh and oppressive in curtailing the legitimate efforts of that party to conduct its business?

3. Is the restraint reasonable from the standpoint of sound public policy? 70

The reasons the employer might require an employee to sign a confidentiality agreement are many. The confidentiality agreement can identify certain specified information as confidential and can remind the employee in writing of the employee's duty to keep the information secret. 71 Because the information must be secret and not generally known to be protected, the confidentiality agreement is evidence that the employer gave the employee the information in confidence. 72 Thus, having the employee sign a confidentiality agreement is a reasonable precaution the employer might take to protect the secrecy of confidential information. 73 Because confidential information is protectable, while the employee's general skill and experience is not, a confidentiality agreement can distinguish between confidential information and general skill and experience. 74 A state may interpret a written confidentiality agreement to give greater employer protection than the protection afforded under common law. 75

The existence of a written confidentiality agreement may deter a prospective employer from hiring a prospective employee. This is especially true where the employee would inevitably reveal the former employer's confidential information, and the former

70. Id.
72. See id. at 181.
73. See id. at 155.
74. See id.
75. See, e.g., Cincinnati Tool Steel Co. v. Breed, 482 N.E.2d 170, 174 (Ill. App. Ct. 1985). In Illinois, this distinction clearly exists; the Cincinnati Tool court stated, "While an enforceable restrictive covenant may protect material which does not constitute a trade secret, an employer's protection absent a restrictive covenant is narrower and extends only to trade secrets... or near permanent customer relationships." Id.
employer has a reputation for strictly enforcing its contracts through litigation. The confidentiality agreement identifies for a prospective employer the information the former employer considered confidential.\textsuperscript{76} A written confidentiality agreement may furnish enough proof to make it more likely that the employer will succeed in a lawsuit filed against the employee for breaching the employee's duty of confidentiality.\textsuperscript{77}

The confidentiality agreement allows the employer to fashion a remedy for an employee's breach tailored to the situation. The usual remedy imposed after a court determines that an employee has breached a confidentiality agreement or is likely to do so is enjoining the employee from revealing confidential information.\textsuperscript{78} A confidentiality agreement may require an employee to return specified documents upon termination of employment or may require the breaching former employee to pay the former employer damages.\textsuperscript{79}

B. Limitations on Enforcement of Confidentiality Agreements

More companies are requiring employees to sign confidentiality agreements.\textsuperscript{80} Because a confidentiality agreement

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\textsuperscript{76} See Feldman, \textit{supra} note 71, at 181.

\textsuperscript{77} See Overholt Crop Ins. Serv. Co. v. Travis, 941 F.2d 1361, 1366 (8th Cir. 1991) (suggesting that non-disclosure provisions are evidence of a confidential relationship between employer and employee); Bell Fuel Corp. v. Cattolico, 544 A.2d 450, 461 (Pa. Super. Ct. 1988) (noting that a non-disclosure provision is evidence of the confidential relationship between employer and employee and the confidential nature of the information subject to the provision); \textit{Cincinnati Tool}, 482 N.E.2d at 180. An Ohio court commented, "[w]ithout the non-disclosure agreements this court might have granted a temporary injunction. Adding non-disclosure agreements to the case law of this state the court certainly sees its duty to grant a temporary injunction . . . ." H.J. Sherwood Inc. v. Fibeco, Inc., 234 N.E.2d 531, 533 (Ohio Misc. 1967). In a case from Rhode Island, the court found that the fact that only one of a number of employees who had access to information was required to sign a non-disclosure provision was evidence that the information was not "confidential" in nature. \textit{See} Nestle Food Co. v. Miller, 836 F. Supp. 69, 75 (D.R.I. 1993).


\textsuperscript{79} Follmer, Rudzewicz & Co. v. Kosco, 362 N.W.2d 676, 682 (Mich. 1984). In \textit{Follmer}, the employee had agreed to pay the former employer damages, based upon a formula, if the employee attracted customers of the former employer. \textit{See} id.

\textsuperscript{80} See Margaret A. Jacobs, \textit{Will Promises of Silence Pass Tests in Court?}, \textit{WALL ST.}
requires employee silence in return for employment, the agreement is sometimes nicknamed a "golden gag." However, the employee's duty to safeguard the employer's or former employer's trade secrets and confidential information is not absolute. Under common law contract and agency principles, a court should be able to set aside a non-disclosure provision if the provision is unconscionable or contrary to public policy. In certain circumstances, public policy or an interest of the employee may outweigh enforcement of a confidentiality agreement.

No reported case has decided whether an employee can blow the whistle in the face of a confidentiality agreement, a California court did consider whether "the statutory privilege for statements made in judicial proceedings... preclude[s] liability for an otherwise wrongful disclosure of trade secrets." Presumably, employees other than Wigand have been sued for breaching confidentiality agreements. The absence of reported cases may be because the parties settled, thereby avoiding disclosure of confidential information during trial, or because trial level decisions were not reported.

A number of law review articles raise the issue of what the limit should be on safeguarding information purportedly protected under a confidentiality agreement. Several of the articles seem to suggest balancing the employer's need to protect proprietary information against the employee's and society's need for

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81. See Carton & Kerber, supra note 1, at B1.
82. See infra notes 437-69 and accompanying text.
83. See Rutzel, supra note 43, at 26. In Khair v. Campbell Soup Co., the question was raised whether the employee could blow the whistle to the EEOC where the employer's counterclaim alleged that the disclosure violated a confidentiality agreement. 893 F. Supp. 316, 321 (D.N.J. 1995). The court noted, "[T]here is a serious issue as to whether under New Jersey law a confidentiality agreement or common law duty may frustrate the right of an employee to report his employer’s illegal conduct to the appropriate government agency." Id. at 337. The court made no decision on the merits of the issue because the issue was raised on a motion for summary judgment. See id. at 322. The court refused to grant the employer's motion for summary judgment on the counterclaim. See id. at 337.
disclosure. One article states:

An examination of the term “trade secret,” as it is defined in a variety of sources, indicates that trade secret principles cannot legitimately be used to defeat protection for... the whistleblower.... All sources of trade secret law observe certain limitations, explicitly or implicitly excluding from protection information concerning wrongdoing.\(^8\)

Another article states:

The basic moral argument in support of the whistleblower is that, while the organization is owed a duty, such a duty is not absolute. When the organization engages in illegal or immoral activity that would be injurious to the society, then the employee has the (moral) right to blow the whistle. The right is grounded on the principle that, when the organization breaks the legal and/or moral rules of the society and when such infractions will result in public harm, the employee's contractual obligation of loyalty loses its moral foundation.\(^7\)

Several other articles boldly proclaim that an employer cannot use trade secret laws or confidentiality agreements to conceal the type of wrongdoing which whistleblower statutes are designed to disclose. One article states:

Under tort law concepts... whistleblowers clearly have a privilege to reveal information regarding wrongdoing, even if in so doing they also disclose trade secrets.... [W]histleblower protection laws should be interpreted to resist circumvention by trade secret principles. Although statutory schemes vary widely, their universal goal is to encourage whistleblowing as a method of exposing and reducing wrongdoing. The societal interests implicated in this context are superior to any interest the employer might assert in the confidentiality of information regarding misconduct. However, an employer would be able to seek redress for a disclosure that would otherwise

\(^8\) Dworkin & Callahan, supra note 85, at 387.
\(^7\) Rongine, supra note 85, at 286.
be a trade secret, if it were subsequently determined not to provide evidence of unlawful or harmful activity.88

One authority has opined that a whistleblower’s true allegation of wrongdoing does not violate a confidentiality agreement whereas false allegations would.89 A confidentiality agreement would be construed against the employer drafter and public policy would not allow the confidentiality agreement to cover illegal activity.90

The same author raises concern for employee liability for whistleblowing in those states without statutory or common law protection for whistleblowers.91 The same assertion is even more boldly made in a case concerning B&W documents allegedly stolen by a former paralegal of a law firm representing B&W.92 In dicta, the judge emphasized:

Whatever may be the proper result in a suit for damages between the private contending parties—a matter on which the Court expresses no opinion—on another question there can be no doubt: the right of federal public health and safety authorities to the custody of the documents evidencing dangers to public health or concealment of knowledge of such dangers by those in a position to abate them clearly prevails over purely private claims involving contracts or torts.93

88. Dworkin & Callahan, supra note 85, at 389 (footnotes omitted).
89. See Rutzel, supra note 43, at 24-26.
90. See id.
91. See id.
93. Id. A newspaper also proclaimed that confidentiality agreements are unenforceable if contrary to public policy. See This is the law?, COURIER-J. (Louisville), Dec. 3, 1995, at 2D. The newspaper comment came after a Kentucky state judge ruled that Wigand could not give a deposition after being subpoenaed by Mississippi because of his confidentiality agreement with B&W. See id. The newspaper stated:

Confidentiality agreements are routinely declared illegal when they are judged to be contrary to public policy. Which is more important: the need for the state to know what Mr. Wigand knows, or a parochial agreement between two parties? And confidentiality agreements were never meant to obscure or hide important evidence in legal cases anyway. They were created to protect trade secrets from competitors,
C. Analogous State Cases

Although scarce, some case law illustrates situations in which another interest was superior to a non-disclosure provision.94 The closest case is ITT Telecom Products Corp. v. Dooley,95 a case concerning California's statutory privilege for statements made in judicial proceedings.96 In ITT, the court held that "the privilege does not apply to the voluntary disclosure of trade secrets in violation of a contract of confidentiality" in a lawsuit between ITT and a customer, but the privilege would allow Dooley, the ITT former employee, to testify in ITT's lawsuit against Dooley for unauthorized disclosure of trade secrets.97 The next closest case is Lachman v. Sperry-Sun Well Surveying Co.,98 a case in which the Tenth Circuit ruled that a non-disclosure provision was unenforceable against an independent contractor.99 A similar situation was found in Re v. Horstmann,100 where a court ruled that non-disclosure provisions were unenforceable against a business associate.101

In ITT, Dooley became an employee of ITT's predecessor and signed a confidentiality agreement in 1967, agreeing not to disclose secret or confidential information without the employer's permission.102 In 1977, ITT acquired all the assets of Dooley's employer and Dooley continued as an employee of ITT until July 1982.103 Intercontinental De Communicaciones Por Satelite, S.A. ("Intercomsa") had purchased a telephone switching system from ITT, and a dispute arose between Intercomsa and ITT over Intercomsa's claim that the system was defective.104 ITT demanded arbitration in October 1982, and Intercomsa filed suit over the allegedly defective system in April 1983.105 A consulting firm hired

which is not the issue here.

Id.
94. See infra notes 95-174.
96. See id. at 774.
97. Id. at 783.
98. 457 F.2d 850 (10th Cir. 1972).
99. See id. at 854.
101. See id. at *4.
102. See ITT, 262 Cal. Rptr. at 775.
103. See id.
104. See id.
105. See id.
Dooley in October 1982 as an expert consultant for Intercomsa. As a consultant, Dooley provided information to Intercomsa concerning whether the system conformed to ITT's specifications and to the contract between ITT and Intercomsa. After balancing the "interest in accurate judicial proceedings" against ITT's interest in enforcing Dooley's confidentiality agreement, the court held that Dooley was not privileged to breach the confidentiality agreement by providing information to Intercomsa. The court carefully noted, "[T]here is no claim Dooley's disclosures were judicially compelled. Dooley does not argue that his alleged breach of contract is excused because his performance was prevented by operation of law... or that the nondisclosure agreement is unenforceable because its object or the consideration is illegal."

In Lachman, lessees were producing oil and gas from a well drilled at some earlier date by an independent contractor. The lessees hired Sperry-Sun to complete a directional survey of the well. The contract between the lessees and Sperry-Sun prohibited Sperry-Sun from disclosing information concerning the survey to any third party. The survey showed that the well angled off such that, at the levels producing oil and gas, the well was producing from the adjoining property. Sperry-Sun employees informed the parties who owned the oil and gas rights on the adjoining property that the well bottomed within the area of their oil and gas rights. In a judgment against the lessees, the parties received the right to the oil and gas proceeds originating within their boundary line; the lessees had to stop up the well at the boundary line. The lessees in turn sued Sperry-Sun for breaching the non-disclosure provision of the contract.

The Lachman court explained that Oklahoma law prohibits misappropriating the natural gas rights of another.
Unintentional misappropriation is punishable by a fine paid to the adjoining owner.\textsuperscript{118} The fine is a maximum of $500 per day of the misappropriation. Intentional misappropriation is a criminal offense.\textsuperscript{119} The court held that although the lessees' action was tortious rather than criminal, public policy could not allow the lessees to enforce the contract and silence Sperry-Sun.\textsuperscript{120} The court noted that:

It is public policy in Oklahoma and everywhere to encourage the disclosure of criminal activity.... The distinction between a crime and a mere tort can often, as here, be a difference brought about by time, and knowledge.... A party bound by contract to silence, but suspecting that its silence would permit a crime to go undetected, would be forced to choose between breaching the contract and hoping an actual crime is eventually proven, or honoring the contract while a possible crime goes unnoticed.\textsuperscript{121}

In Re, Re required Horstmann and Constantinou to sign non-disclosure agreements before allowing Horstmann and Constantinou to view Re's invention.\textsuperscript{122} Horstmann subsequently contacted Delaware law enforcement agents alleging fraud against Re.\textsuperscript{123} Re's associate, Wilkinson, entered a Robinson plea of guilty to securities violation charges and Re entered into a cease and desist order with the Office of the Delaware Attorney General.\textsuperscript{124} Re sued Horstmann and Constantinou claiming damages for breach of the non-disclosure agreements.\textsuperscript{125} The court dismissed Re's claim for breach of the non-disclosure agreements, holding that the disclosures to law enforcement agents were privileged because they were in the public interest, resulting in criminal charges against Wilkinson and Re entering into a cease and desist order.\textsuperscript{126}
Courts in two other cases indicated in dicta that disclosure of confidential information is privileged in certain circumstances. The two cases are *United States v. Wallington* and *Systems Operations, Inc. v. Scientific Games Development Corp.*

In *Wallington*, Wallington, an employee of the Regional Intelligence Branch of the Customs Service, gathered some information from a government computer database for an old friend. Wallington turned the information over to the friend in violation of Customs Service policy to maintain the security of database information. Wallington was convicted of violating 18 U.S.C. § 1905, which prohibits disclosure of government confidential information. Wallington appealed his conviction, claiming that the statute was invalid on its face.

One of Wallington's challenges to the statute was that it was a "constitutionally overbroad regulation of expression" on its face. The court held that the statute was not facially unconstitutional, but commented that it could be held to be unconstitutional as applied in "an extraordinary case." In dicta, the court stated, "Admittedly, in an extraordinary case, an employee's interest in expression on a matter of vital public concern might well outweigh the government's interest in confidentiality."

In *Systems*, Systems Operations, Inc. ("Systems") was a consulting firm involved in the development and marketing of public lotteries. Scientific Games Development Corp. ("Scientific") conducted a similar business, particularly concerning instant lotteries. Several representatives of Scientific allegedly told state lottery officials from several states that Systems' instant lottery tickets could be easily "broken" (i.e., read without scraping the cover over the numbers). The Scientific representatives
allegedly refused to reveal to state lottery officials how the Systems' tickets could be broken.\textsuperscript{139} Systems sued Scientific requesting that the court enjoin Scientific from disparaging Systems' products.\textsuperscript{140} The court held that Scientific had the burden of proving that their statements concerning Systems' products were true.\textsuperscript{141} Scientific refused to disclose to the court how Systems' tickets could be broken, either to avoid disclosing trade secrets or to avoid disclosing to Systems how the Systems tickets could be broken.\textsuperscript{142} The court commented that any disclosure by Scientific would be privileged.\textsuperscript{143} The court noted, "Trade secrets are not privileged and must be disclosed when a substantial need exists."\textsuperscript{144} The court also noted, "[T]o the extent that Scientific Games' representatives will act at the request of lottery directors and give full assistance in the public interest, this Court considers such activity privileged."\textsuperscript{145} The court held:

[W]hen the defendants are responding to written requests for assistance in ticket evaluation from a lottery director and such responses as relate to ticket security are accompanied by a full and factual explanation of how a ticket was determined to be insecure, the defendants' statements are privileged. This qualified privilege is brought about in these circumstances because of the strong public interest in the security of lottery tickets.\textsuperscript{146}

The appellate court reversed, finding that the lower court had failed to apply New Jersey law.\textsuperscript{147}

In its 1997-1998 term, the United States Supreme Court considered whether an injunction entered against a former employee disclosing General Motors Corporation's ("GM") trade secrets, confidential information, and information covered by client-attorney work product was enforceable against a third party

\begin{itemize}
\item \textsuperscript{139} See id. at 761.
\item \textsuperscript{140} See id. at 751.
\item \textsuperscript{141} See id. at 761.
\item \textsuperscript{142} See id. at 762.
\item \textsuperscript{143} See id. at 763.
\item \textsuperscript{144} Id. at 762.
\item \textsuperscript{145} Id. at 763 (citing Restatement of Torts § 772 (1939)).
\item \textsuperscript{146} Id. at 765-66.
\end{itemize}
in a products liability action. The case was tried in federal court under the court’s diversity jurisdiction. In *Baker v. General Motors Corp.*, the sons of a woman killed in an automobile accident sued GM claiming that a faulty fuel pump in the Chevrolet Blazer in which their mother was riding caught on fire and caused her death. At trial, a former GM employee, Ronald Elwell, was allowed to testify. As a GM employee, Elwell was a fifteen-year member of GM’s Engineering Analysis staff, a staff responsible for reviewing the engineering of company vehicles in connection with the defense of products liability litigation and assisting GM attorneys in the litigation. After termination as a GM employee, Elwell testified against GM in a products liability lawsuit and sued GM for wrongful termination. GM counterclaimed and sought an injunction prohibiting Elwell from disclosing privileged and confidential information. The Michigan court entered a preliminary injunction, the parties settled, and the Michigan court entered a permanent injunction based on the settlement. The permanent injunction prohibited Elwell from disclosing GM trade secrets, confidential information, and privileged information and testifying without GM’s prior written consent; however, Elwell could testify under court order.

The Eighth Circuit reversed the Missouri federal district court

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The issue is not limited to the auto industry, nor is it limited to civil litigation between private parties. For example, Brown & Williamson Tobacco Corporation procured a Kentucky state-court injunction against Jeffrey Wigand, former vice-president for research and development at Brown & Williamson, in an attempt to prevent him from being called to testify by the Mississippi Attorney General in a civil case in a Mississippi court. Four tobacco companies have also sought injunctions from a North Carolina court to prevent former Liggett Group executives from testifying in tobacco cases brought by state attorneys general.

*Id.* at *22* (footnotes omitted).

149. See *id.* at *3.


151. See *Baker*, 86 F.3d at 814.

152. See *id.* at 815.

153. See *id.* at 815 n.1.

154. See *id.* at 815.

155. See *id.*

156. See *id.*

$11.3 million verdict against GM. In reversing, the circuit court held, among other rulings, that the Michigan injunction was entitled to full faith and credit. The circuit court rejected the district court ruling that Missouri public policy favored disclosure of nonprivileged and relevant information, finding that Missouri policy in favor of full faith and credit was equally as strong.

Another line of cases concerns the enforceability of settlement agreements. Two of the cases, Bowman v. Parma Board of Education and Allen v. Jordanos' Inc., address whether a settlement agreement is enforceable against a former employer who discloses allegedly illegal or discreditable activities of a former employee. The Bowman court held that the non-disclosure provision requiring the school district to keep its investigation of the alleged pedophilia of a former district teacher was void as against public policy. The Allen court held that the nondisclosure agreement was unenforceable because "[a] bargain which includes as part of its consideration nondisclosure of discreditable facts is illegal."

In Bowman, a teacher in the Parma City school district resigned after the Parma Board of Education began to investigate charges of child molestation against the teacher. In the settlement agreement, the district agreed not to disclose the circumstances surrounding the teacher's resignation. After the Lorain City school district hired the teacher, a Parma school board member subsequently informed the president of the Lorain Board of Education of the circumstances of the teacher's resignation. The teacher sued the Parma school board for disclosing information in violation of the settlement agreement. The court held the non-disclosure clause void as against public policy because it required suppression of criminal conduct.

In Allen, the employer claimed theft and dishonesty of an

158. See Baker, 86 F.3d. at 820.
159. See id.
160. See id. at 819.
162. 125 Cal. Rptr. 31 (Ct. App. 1975).
163. See Bowman, 542 N.E.2d at 664-66.
164. Allen, 125 Cal. Rptr. at 34.
165. See Bowman, at 665-66.
166. See id.
167. See id.
168. See id. at 664.
169. See id. at 666.
employee. The employer orally agreed not to disclose the claimed theft and dishonesty in exchange for the employer laying off the employee and allowing the employee to collect unemployment and union benefits. Under California law, it is a misdemeanor to withhold or fail to report relevant information to the Department of Human Resources Development, the department responsible for administering unemployment benefits. When the employer allegedly breached the nondisclosure agreement, the employee sued. The court held that the agreement was void because it was based on an illegal act.

The other settlement cases concern whether employer-employee settlement agreements are enforceable against the federal government or against an employee making a claim under a federal statute. Those cases are discussed in the following section.

D. Federal Cases

Another line of cases concerned whether an employer-employee settlement or confidentiality agreement was enforceable where information was sought under a federal statute. The agreements prohibited the employee or former employee from disclosing employment-related information. In contrast to the Wigand situation in which B&W sued to enforce non-disclosure provisions, the requested action in each of the cases was to challenge the enforcement of a non-disclosure provision. In each case, the challenge to enforcement of the non-disclosure provision had a public policy flavor. Of the eight cases more fully discussed below, five involved the federal government or a federal agency or department as the party requesting that a non-disclosure provision be set aside. The other three cases were lawsuits brought by private parties under federal employment anti-discrimination statutes, in which the plaintiff asked that fellow former employees

170. See Allen, 125 Cal Rptr. at 32.
171. See id.
172. See id. at 33.
173. See id. at 31.
174. See id. at 34.
176. See infra notes 187-240.
be relieved from non-disclosure obligations. Three of the cases involved the Equal Employment Opportunity Commission ("EEOC"). Other cases involved claims under Title VII of the Civil Rights Act of 1964, the False Claims Act, the Energy Reorganization Act of 1974 and the Age Discrimination in Employment Act; another involved a claim of sexual discrimination.

The common thread running through all of the decisions is that it is contrary to public policy to block communication needed to carry out the purpose of a federal act. In all but one of the cases, the court held that the settlement agreement was not enforceable at least to some extent because enforcement of the settlement agreement would have deprived the government of information. In one case, the settlement of an employment discrimination case filed twelve years before was held enforceable where the government had had the opportunity to gather relevant information through deposition and testimony.

EEOC v. Astra USA, Inc. is one of the most recent of the cases. In June 1996, the EEOC challenged the enforceability of settlements between Astra USA and employees. The EEOC claimed that the settlements had hindered its investigation into accusations against the company of widespread sexual harassment and a hostile work environment.

In Astra, the EEOC had contacted employees of Astra to investigate three sexual harassment charges filed against the company. Astra had settled sexual harassment claims with at least eleven employees. One employee told an EEOC investigator that

177. See id.
178. See infra notes 187-205.
183. See infra notes 187-240 and accompanying text.
185. See infra notes 187-240 and accompanying text.
187. 94 F.3d 738 (1st Cir. 1996).
188. See id. at 739.
189. See Carton & Kerber, supra note 1, at 1B.
190. See Astra, 94 F.3d at 740.
191. See id.
the employee could not disclose relevant information "due to a confidential settlement agreement that she had entered into with Astra." 192 Another employee was reluctant to speak with an EEOC investigator but would not say whether she and Astra had signed a settlement agreement. 193 The settlement agreements resemble each other in that under the agreements:

1. The employee agrees not to file EEOC claims;
2. The employee agrees not to help any employee filing EEOC claims;
3. The employee releases Astra and its management from all employment-related claims; and
4. The employee agrees not to disclose information concerning the employee's EEOC claim and information concerning the settlement agreement. 194

The federal district court enjoined Astra "from entering into or enforcing provisions of any Settlement Agreements which prohibit current or former employees from filing charges with the EEOC and/or assisting the commission in its investigation of any charges." 195 The Astra court stated:

In performing that balancing here, we must weigh the impact of settlement provisions that effectively bar cooperation with the EEOC on the enforcement of Title VII against the impact that outlawing such provisions would have on private dispute resolution. . . . Clearly, if victims of or witnesses to sexual harassment are unable to approach the EEOC or even to answer its questions, the investigatory powers that Congress conferred would be sharply curtailed and the efficacy of investigations would be severely hampered. What is more, the EEOC acts not only on behalf of private parties but also "to vindicate the public interest in preventing employment discrimination." . . . In many cases of widespread discrimination, victims suffer in silence. In such instances, a sprinkling of settlement agreements that

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192. Id. at 741.
193. See id.
194. Id.
195. Id. at 742.
contain stipulations prohibiting cooperation with the EEOC could effectively thwart an agency investigation. 196

The court affirmed that portion of the lower court injunction that allowed current or former employees to assist in EEOC claims. 197 Astra had claimed that the assistance portion of the injunction was unnecessary because the EEOC could obtain the same information through its subpoena power. 198 The court rejected Astra's claim, fearing that allowing the EEOC to gather information only through subpoena would restrict communication with the EEOC. 199 The circuit court dissolved that portion of the lower court injunction which prohibited current or former employees from filing EEOC charges because there was no evidence that anyone else wanted to file EEOC charges. 200

The court in Hamad v. Graphic Arts Center, Inc. 201 followed Astra. In Hamad, Taleb Hamad had sued Graphic Arts Center, Inc. ("GAC") "for race and national origin discrimination and for retaliation for filing a workers' compensation claim" under federal and state statutes. 202 Previously, Byron Gruse, a former employee of GAC, had entered into a settlement agreement with GAC. 203 Hamad had subpoenaed Gruse to appear for a deposition and GAC moved to quash the subpoena because the settlement agreement contains confidentiality provisions which would prevent Gruse from being deposed. 204 The court concluded "that any provision in the settlement agreement which prohibits Gruse from testifying as required by the subpoena are [sic] against public policy and therefore void." 205

In EEOC v. Cosmair, Inc., 206 Cosmair fired Robert Lee Terry on March 18, 1986, and three days later Terry signed a release in which he agreed to release any claims against Cosmair in exchange

196. Id. at 744.
197. See id. at 747.
198. See id. at 745.
199. See id.
200. See id. at 745-46.
203. See id.
204. See id.
205. Id. at *2.
206. 821 F.2d 1085 (5th Cir. 1987).
for thirty-nine weeks of salary and medical benefits. On April 7, 1986, Terry filed an EEOC charge under the Age Discrimination in Employment Act. The court held that "an employer and an employee cannot agree to deny to the EEOC the information it needs to advance this public interest. A waiver of the right to file a charge is void as against public policy."

In Kalinauskas v. Wong Lin T. Kalinauskas sued Caesars Palace Hotel & Casino ("Caesars"), her former employer, for sexual discrimination. The prior year, Donna Thomas, another former Caesars employee had sued for sexual discrimination but had settled, with the court sealing the confidential settlement agreement. As part of her discovery, Kalinauskas wanted to depose Thomas. The court held that Kalinauskas was entitled to depose Thomas as long as the deposition did not reveal any substantive terms of the settlement agreement.

In Hoffman v. United Telecommunications, Inc., Phyllis Hoffman and her former employer had settled Hoffman’s employment discrimination lawsuit in 1987, long after it was originally filed. Prior to the settlement, Hoffman had been deposed and had testified concerning her allegations. One provision of the settlement barred Hoffman, except under subpoena, from participating in the related class claims that the EEOC was pursuing. The EEOC asked the court to hold the provision unenforceable. The court found that the settlement

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207. See id. at 1087.
208. See id.
209. Id. at 1090. The court differentiated between an ADEA (Age Discrimination in Employment Act) charge and an ADEA cause of action. An ADEA charge simply communicates information to the EEOC, while an ADEA cause of action asks that the employee recover against the employer. See id. at 1089. The court stated, “[A]lthough an employee cannot waive the right to file a charge with the EEOC, the employee can waive not only the right to recover in his or her own lawsuit but also the right to recover in a suit brought by the EEOC on the employee’s behalf.” Id. at 1091.
211. See id. at 365.
212. See id.
213. See id.
214. See id. at 367.
216. See id. at 1513.
217. See id.
218. See id.
219. See id.
provision was not contrary to public policy, especially because the provision allowed Hoffman to testify under subpoena. The court stated, "[P]laintiff's interest in recovering monetary compensation in a private settlement of an employment discrimination lawsuit that has been pending twelve years outweighs, under the circumstances of this case, any harm to the public policy that encourages cooperation in an investigation of the subject employer." 221

In Connecticut Light & Power Co. v. Secretary of the United States Department of Labor, 222 John Delcore worked as a general electrical foreman, supervising subcontracting work at Millstone Nuclear Power Plant, which was operated by Connecticut Light & Power Co. ("L&P"). 223 After his employer terminated him, Delcore voiced various allegations to the Nuclear Regulatory Commission and later filed a whistleblower lawsuit against his former employer and L&P. 224 A proposed settlement would have prohibited the former employee from voluntarily appearing in judicial or administrative proceedings, would have required the employee to resist compulsory process, and would have restricted the former employee's communications with the Nuclear Regulatory Commission. 225 The court held that the proposed settlement agreement violated section 210 of the Energy Reorganization Act of 1974, "a remedial statute intended to shield employees from adverse action taken by their employers in response to employees' complaints of safety violations." 226 The court stated, "[T]his kind of discriminatory action... can represent a significant threat to the statutory purpose of ensuring clear lines of communication between employees and regulatory agencies." 227

In United States v. Northrop Corp., 228 Michael Green, a former Northrop employee filed a *qui tam* action against Northrop under the False Claims Act. 229 Green claimed that Northrop had double billed the government and had otherwise violated the False Claims

220. *See id.* at 1514.
221. *Id.*
222. 85 F.3d 89 (2d Cir. 1996).
223. *See id.* at 91.
224. *See id.*
225. *See id.* at 91 n.1.
226. *Id.* at 96.
227. *Id.* at 96 n.5.
228. 59 F.3d 953 (9th Cir. 1995).
229. *See id.* at 956.
Prior to filing suit, Green had settled with Northrop, agreeing to release all claims and causes of action in exchange for $190,000. Northrop claimed that Green’s lawsuit should be dismissed because of the prior settlement. The court held that it was against public policy to enforce a release which would have barred Green from bringing a qui tam claim where United States did not consent to the release. The court held, “It is critical to observe . . . that the government only learned of the allegations of fraud and conducted its investigation because of the filing of the qui tam complaint.”

In Chambers v. Capital Cities/ABC Robert Chambers sued Capital Cities for age discrimination under the federal Age Discrimination in Employment Act and state law. Chambers had asked permission to have Chambers’ attorney tell former employees of Capital Cities that they would suffer no adverse consequences if they disclosed information concerning Capital Cities even if the disclosures were in violation of any confidentiality agreement. The court refused plaintiff counsel’s request but gave defense counsel the option of notifying former employees in writing that they could disclose non-confidential information concerning defendant’s “hiring, assignment, and discharge policies” at a deposition or with defense counsel present. If defense counsel chose not to so notify former employees, the court could draw an adverse inference. The court noted:

Absent possible extraordinary circumstances not involved here, it is against public policy for parties to agree not to reveal, at least in the limited contexts of depositions or pre-deposition interviews concerning litigation arising under federal law, facts relating to alleged or potential violations of such law. . . . To the extent state-law based contracts interfere unreasonably with federal judicial proceedings under federal law.
If applied to depositions or pre-deposition interviewing with respect to litigation under federal substantive law, agreements calling or appearing to call for silence concerning matters relevant to alleged legal violations, whether or not such agreements are sought to be enforced, inherently chill communication relevant to the litigation. Where conduct of a party tends to preclude availability of information relevant to a litigation and where no genuine basis for keeping that information exists, a court or fact-finder may infer that the information, if disclosed, would be contrary to the position of the party engaging in such conduct. 240

III. WHISTLEBLOWING

A. Introduction

Before determining whether there should be a whistleblowing public policy exception to confidentiality agreements, it is helpful to examine the reasons for and against allowing whistleblowing. At the heart of the dilemma is the adversarial relationship among the employer, the employee and society. The employment at will doctrine was premised on the employer’s need for almost absolute control in the workplace rather than society’s need for information or the employee’s need for workplace security. Under the employment at will doctrine, the employer has traditionally been allowed to discharge an employee at will for any reason. Whistleblowing is a newer approach than the traditional employment at will doctrine to the complex relationship among the employer, the employee and society.

Along with the employer’s need for workplace control is the idea that employee whistleblowing undermines the employer’s concerns for productivity, efficiency, and control over employees and interferes with the employer’s right to manage a private business. 241 Whistleblowing leads to unnecessary governmental

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240. Id. at 445.
241. One scholar calls “efficiency, productivity and profits” the “legitimate goals of the firm.” Rongine, supra note 85, at 284. Other scholars note the
(judicial) interference with private enterprise. Courts are not equipped to examine matters of private concern. Whistleblowing is in direct conflict with the employee’s traditional duties of obedience, loyalty, and confidentiality and weakens necessary workplace authority; it may engender conflict among workers


[A] legitimate interest of an organization is maintaining its effectiveness. The effectiveness of an organization depends, at least in part, on a functioning authority structure. When whistleblowing circumvents the existing structure of internal responsibility and supervision, it implicitly criticizes the effectiveness of existing systems of internal control, weakens the chain of command, and constitutes unpredictable behavior.

In Dicomes v. State, the Washington Supreme Court found that the employee’s whistleblowing was the result of a difference of opinion and “unnecessarily interfered with the political and discretionary decision-making process of her appointed supervisor and ultimately of the Governor.” 782 P.2d 1002, 1009 (Wash. 1989).


243. One commentator stated, “Loyalty to one’s firm and obedience to one’s superiors are essential components of a successful organization. Absent the ‘cement’ supplied by these attributes, esprit de corps evaporates, interpersonal trust fails to develop and the joint pursuit of common goals becomes impossible.” Rongine, supra note 85, at 284, see also Herman v. Western Fin. Corp., 869 P.2d 696, 698 (Kan. 1994) (involving an employee regional mortgage loan operations manager who had her attorney discuss a violation of the association’s underwriting guidelines with the vice president and general counsel of employer; on appeal, the court affirmed summary judgment for the employer on employee’s retaliatory discharge claim); Lee v. Denro, Inc., 605 A.2d 1017, 1018 (Md. Ct. Spec. App. 1992) (affirming the dismissal of a complaint where employee had protested deviation from testing procedures of communication systems to employer and, on one occasion, to Federal Aviation Administration inspector; employee’s allegations did not show employer violated any federal statute and dispute seemed to be a normal employer/employee dispute).
and between workers and management (loss of trust and cooperation).\textsuperscript{244}

The employer is also concerned with the additional costs to the business. Bad publicity results in unjustified loss of goodwill, sales, and product viability.\textsuperscript{245} The cost to investigate whistleblowing claims is significant.\textsuperscript{246} Private sector autonomy and flexibility are threatened; whistleblowing adds extra unnecessary procedure and paperwork. Whistleblowing exposes confidential

\textsuperscript{244}. Fellow employees may distance themselves from the whistleblower. “[R]ather than being viewed with admiration by their peers, whistleblowers are treated with scorn and disdain and are often rewarded with labels such as ‘snitch,’ ‘rat,’ and ‘tattletale.’” Culp, supra note 241, at 115. “[W]hisbleblowing may violate group norms and thereby threaten the cohesiveness and positive working climate within an organization.” Rutzel, supra note 43, at 33 (footnote omitted). In balancing workplace “harmony and productivity” against statements concerning the employer’s product, harmony and productivity sometimes outweigh disclosure. See Smith v. Calgon Carbon Corp., 917 F.2d 1338, 1345 (3d Cir. 1990).

For examples of worker and management conflict, see Smith-Pfeffer v. Superintendent of the Walter E. Ferald State School, 533 N.E.2d 1368, 1370 (Mass. 1989) (reversing, on appeal, a judgment entered on a jury verdict for employee unit director of state operated facility for the mentally retarded; court held that dismissal of director because of her opposition to superintendent’s reorganization plan did not violate public policy); Holewinski v. Children’s Hosp., 649 A.2d 712, 713 (Pa. Super. Ct. 1994) (involving a hospital employee who voiced concern about proposed new head of pediatric nursing to management; complaint alleging wrongful discharge properly dismissed because not based on recognized public policy exception).

\textsuperscript{245}. For example, one commentator has noted that “[r]eputation and image are fragile commodities, and the public not always acts rationally in condemning activities.” Rutzel, supra note 43, at 36. Publicity may have a positive effect where the company is attempting to suppress a health or safety danger. “Negative publicity is a potentially effective deterrent to misconduct because it can have a detrimental impact on credit-worthiness, recruiting, employee morale, sales, and investors’ perceptions.” Elletta Sangrey Callahan & Terry Morehead Dworkin, Who Blows the Whistle to the Media, and Why: Organizational Characteristics of Media Whistleblowers, 32 Am. Bus. L.J. 151, 152 (1994) (footnotes omitted).

\textsuperscript{246}. See Rutzel, supra note 43, at 34. Rutzel noted that:

External whistleblowing may lead to additional costs besides those arising for investigating and correcting the wrongdoing internally. Government may impose costly measures to prevent further hazards, may revoke or limit licenses, fine the organization, and hold it liable for damages. In addition, the organization may lose efficient managers, either through imprisonment or loss of legal prerequisites necessary to work in their current capacities, or as a result of public or shareholder pressure to discharge those perceived to be responsible for the wrongdoing.

\textit{Id.}
information and gives competitors an advantage; the employer loses money spent on research and development of the confidential information. If trade secrets and confidential information are considered property, whistleblowing results in taking of property without compensation. Employees discharged for legitimate reasons may file retributive suits against former employers. Fear of retributive suits leads employers to screen out those believed to be potential litigants from being hired as employees. Tighter screening of potential employees increases hiring costs. Employers may tend to not hire minorities, fearing that they will not cooperate with fellow employees.

A perceived problem with whistleblowing is that the employee does not have the judgment to refrain from whistleblowing when whistleblowing is not appropriate. The employer fears that whistleblowing allegations may be false. The underachieving employee may veil poor job performance with threats of whistleblowing or the disgruntled employee may use whistleblowing to get even with the employer by submitting meritless claims. The whistleblowing information may concern

247. See supra notes 28-32 and accompanying text.
249. See Palmer v. Brown, 752 P.2d 685, 690 (Kan. 1988). A fear is that a whistleblower may act out of "a corrupt motive such as malice, spite, jealousy or personal gain." Id.
250. See Culp, supra note 241, at 133-34. Because false whistleblower claims are costly to the employer, the employee should be sure of the facts before blowing the whistle. See id. “[F]alse allegations are neither in the interest of the organization nor of society. False allegations incur investigation costs for both the employer and the government, and public resources are wasted by binding funds and manpower in unnecessary investigations or court proceedings.” Rutzel, supra note 43, at 36. Just as costly are claims with insufficient basis. See Stuart v. Beech Aircraft Corp., 753 F. Supp. 317, 324-25 (D. Kan. 1990), aff’d, 936 F.2d 584 (10th Cir. 1991). In Stuart, a senior staff engineer told management of design disadvantages of starship aircraft, but the court, applying Kansas law, granted the employer’s motion for summary judgment because the engineer’s evidence was insufficient to show he was discharged in retaliation for his design complaints and his design complaints were thoroughly investigated by employer but rejected. See id. See also Schriner v. Meginnis Ford Co., 421 N.W.2d 755, 755 (Neb. 1992) (involving a mechanic who reported an alleged violation of state odometer law to the Nebraska Attorney General’s office). Although Nebraska generally recognizes a public policy exception to the employment at will doctrine, the Schriner court held that the employee did not act good faith and refused to find an exception to the at will doctrine. See id.
251. In Winters v. Houston Chronicle Publishing Co., 795 S.W.2d 723 (Tex. 1990) (Doggett, J., concurring), the concurring justice stated, “Concomitantly, this
private safety rather than public safety and a private matter rather than a public matter. The employee may be protesting social policies not affecting public policy rather than public health or safety. The employee may choose the least appropriate and most disruptive manner to whistleblow. Employers may be forced to narrow exception [to employment at will] should protect only honest employees who follow principles of integrity and social responsibility at the peril of unemployment, not the disgruntled worker who makes unfounded complaints against the employer's activities or acts out of less admirable motives such as spite. See, e.g., Sanchez v. New Mexican, 738 P.2d 1321, 1322-24 (N.M. 1987) (involving a newspaper employee who claimed he was discharged for reporting to supervisors his newspaper's alleged failure to pay gross receipts tax on national advertising accounts. The judgment for the employer was affirmed because there was sufficient evidence that discharge was not based on employee whistleblowing). See, e.g., Brown v. Hammond, 810 F. Supp. 644, 647 (E.D. Pa. 1993) (applying Pennsylvania law; paralegal/secretary disclosed allegedly improper billing practices of attorney to various authorities and affected clients; whistleblower count dismissed because it involved no clearly mandated public policy); Mistishen v. Falcone Piano Co., 630 N.E.2d 294, 295-96 (Mass. App. Ct. 1994) (involving an employee piano technician who reported to employer loose tuning pins and wrong technique used to tighten pins. The appeals court affirmed summary judgment for employer because, although employee alleged violation of statute prohibiting unfair and deceptive practices, employee's disagreement with employer concerned internal matters); Wright v. Shriners Hosp. for Crippled Children, 589 N.E.2d 1241, 1243-44 (Mass. 1992) (on appeal, court reversed judgment for employee nurse holding the there was insufficient evidence; nurse's critical remarks to a survey team from the national Shriners organization and a subsequent firing would not have violated public policy because it was an internal matter); Krajsa v. Keypunch, Inc., 622 A.2d 355, 356 (Pa. Super. Ct. 1993) (involving an employee who claimed that defendants unlawfully inflated their bills. The employee was fired when he threatened to report to proper authorities. The trial court ruling affirmed that no action for wrongful discharge existed because no clear mandate of public policy was involved). See, e.g., Nichols v. Metropolitan Ctr. for Indep. Living, Inc., 50 F.3d 514, 514 (8th Cir. 1995) (applying Minnesota law; support services coordinator for center for independent living protested reduction in transportation services to supervisor and board of directors because the center might cease to be certified and lose its public funding; whistleblower claim properly dismissed because her complaint concerned management policies and not a violation of law); Farnam v. Christa Ministries, 807 P.2d 830, 830 (Wash. 1991) (involving a nurse at a Christian organization nursing home who objected to the removal of NG tubes and reported the action to the organization's board of trustees, to the Washington Department of Social & Health Services, and to the Seattle Times. The jury found for the nurse and the appellate court reversed denial of the motion for judgment notwithstanding the verdict because the organization's actions were legally protected, did not constitute abuse or neglect, and organization complied with the Natural Death Act). See Palmateer v. International Harvester, 421 N.E.2d 876, 885 (Ill. 1981)
retain incompetent workers who have complained for fear of lawsuits if the workers are discharged. Some employees may desire publicity and whistleblowing to the media may appeal to simple curiosity and voyeurism rather than the public's need to know.

On the other hand, society may benefit greatly from whistleblowing. Whistleblowing can safeguard public health and safety by promoting compliance with health and safety regulations. Internal reporting allows management to correct problems with less cost to the organization. Public policy favors citizens who report crimes.

The employee also benefits from whistleblowing. Protection

[1] Internal reporting would prevent negative publicity, investigations, and administrative and legal actions that usually ensue after external whistleblowing. It also would give the company an opportunity to prevent other more serious consequences of continued wrongdoing, and thus to diminish the likelihood of punitive damages for such wrongdoing. Finally, a proper company response to the internal whistleblower could also prevent the negative consequences to the work environment and the whistleblower that almost inevitably follow external whistleblowing.

Id.
for whistleblowing provides job security,\textsuperscript{259} improves job satisfaction,\textsuperscript{260} encourages ethical behavior,\textsuperscript{261} and allows the employee to provide input in the workplace.\textsuperscript{262} Whistleblowing regulation encourages whistleblowing and prevents social rejection of the whistleblower. The media is a key outlet where internal whistleblowing has been ineffective and no governmental agency regulates the industry, because the media can protect the whistleblower.\textsuperscript{263} External reporting to media is influential in causing change, and the media provides an independent investigation of the alleged wrongdoing; the investigation enhances the credibility of the whistleblower’s disclosure.\textsuperscript{264}

Whistleblowing is beneficial to the organization as well. Internal reporting allows management to address problems in their incipiency with less cost to the organization, preventing continued wrongdoing and avoiding lawsuits.\textsuperscript{265} Internal whistleblowing safeguards the organization’s goodwill. The threat of possible government intervention may encourage the organization to act ethically. The threat of whistleblowing may deter wrongdoing by the organization or management. Internal reporting may forewarn the organization and enable it to successfully deal with adverse publicity.\textsuperscript{266} Responsiveness to internal whistleblowing reduces adverse reaction by management and coworkers. Internal whistleblowing is an efficient source of feedback.\textsuperscript{267} Whistleblowing

\begin{footnotes}
\item[260] See id.
\item[261] See id.
\item[262] See Dworkin & Callahan, \textit{supra} note 241, at 281, 300-02. Courts have encouraged internal reporting of health and safety concerns by employees. See id. Employees may desire to eliminate wrongdoing in the workplace and can provide input to the employer in making any necessary change. Another commentator stated, “[A]lthough internal whistleblowing may disturb the working climate, it may enhance it by pacifying a workforce, increasing feelings of security, and by encouraging ethical behavior.” Rutzel, \textit{supra} note 43, at 33.
\item[263] In his concurring opinion in \textit{Winters}, Justice Doggett stated, “Often the very act of whistleblowing indicates that government regulation has been inadequate to protect the public.” \textit{Winters} v. Houston Chronicle Publ’g Co., 795 S.W.2d 723, 728 (Tex. 1990).
\item[264] See Dworkin & Callahan, \textit{supra} note 85, at 390-93.
\item[265] Many Fortune 500 companies view whistleblowing as positive. Approximately half have a toll-free number that employees may use to anonymously report wrongdoing. See Ellen Neuborne, \textit{Whistle-blowers Pipe Up More Frequently}, USA TODAY, July 22, 1996, at 2B; see also Culp, \textit{supra} note 241, at 132; Dworkin & Near, \textit{supra} note 257, at 242; Rutzel, \textit{supra} note 43, at 33.
\item[266] See Dworkin & Near, \textit{supra} note 257, at 300.
\item[267] See \textit{Winters}, 795 S.W.2d at 728-29 (Doggett, J., concurring) (“Employees
\end{footnotes}
promotes organizational loyalty if the information is welcomed, and whistleblowing often comes from long-time employees.\textsuperscript{268} Internal whistleblowing allows management to correct any lack of knowledge of the employee or explain a difference in social policy.\textsuperscript{269}

B. Whistleblowing under State Law

The question is whether a confidentiality agreement that shields from disclosure illegal acts or public health and safety risks is contrary to public policy. This question arises against a background of state whistleblowing statutes and cases finding a public policy whistleblowing exception to the employment at will doctrine. At least forty-one states protect whistleblowers through statutes.\textsuperscript{270} The statutory protection varies from states to state, with

are the first to learn of activities in the workplace that may have an adverse effect upon the public and are in the best position to bring to a halt threatening conduct before irreversible damage is done.”

\textsuperscript{268}. See Dworkin & Near, \textit{supra} note 257, at 303-04 n.200.
\textsuperscript{269}. See id. at 243. The commentators noted:

In some cases the whistleblowing may not concern actual wrongdoing but may simply reflect the employee’s ignorance about the organization’s actions or a difference in opinion as to ethical standards. This is one reason for executives to prefer internal whistleblowing: they may learn of disagreements about ethical standards—and have the chance to clarify these—before the complaint of wrongdoing is made public. In addition, top executives may actually be unaware of wrongdoing committed by subordinates; internal complaints give them a chance to stop the wrongdoing before it is made public knowledge.

\textit{Id.}

some whistleblowing statutes applying only to public employees and others covering private employees. The type of information about which a whistle may be blown also varies. The majority of state statutes protect whistleblowing that discloses a violation of federal, state, or local law. Other state statutes are more restrictive.\footnote{271}

A steadily growing body of case law concerns the whistleblowing public policy exception to the employment at will doctrine. Under the employment at will doctrine, the employer had traditionally been allowed to discharge an employee at will for any reason.\footnote{272} In 1959, California became the first state to create a public policy exception to the employment at will doctrine.\footnote{273} Now recognized in a majority of states, the public policy exception generally applies to four types of cases.\footnote{274} The first three types of cases protect the employee discharged for performing a public obligation, for exercising a statutory right, and for refusing to perform an illegal or unethical act.\footnote{275} The fourth type of case recognizes a public policy exception to the employment at will doctrine for whistleblowing.\footnote{276}

\begin{footnotes}

\footnotetext[271]{See Rutzel, supra note 43, at 26.}

\footnotetext[272]{See Christopher L. Pennington, Comment, The Public Policy Exception to the Employment-at-will Doctrine: Its Inconsistencies in Application, 68 TUL. L. REV. 1583, 1593 (1994).}


\footnotetext[275]{See id. at 486.}

\footnotetext[276]{See id at 485; see generally Frank J. Cavico, Employment at Will and Public Policy, 25 AKRON L. REV. 497 (1992); Mark A. Fahleson, The Public Policy Exception to Employment at Will—When Should Courts Defer to the Legislature?, 72 NEB. L. REV. 956 (1995); Venessa F. Kuhlmann-Macro, Note, Blowing the Whistle on the Employment at-}
\end{footnotes}
The employment relationship is a continuum with just cause termination at one end and strict employment at will with no public policy exception at the other end. Most states have recognized that strict employment at will is too harsh and have tried to find a middle course allowing an exception where there is a clear violation of public policy. Cases recognizing a whistleblowing public policy exception to the employment at will doctrine contain reasoning which may profitably be reviewed as one starting point in fashioning a whistleblowing public policy exception to confidentiality agreements. In most cases, the court requires that the information sought to be disclosed must affect public (not private) interests of health or safety, or must concern illegal conduct.

The "public" in public policy suggests that courts deciding whistleblowing cases should differentiate between, on one hand, whistleblowing affecting an interest of society and, on the other hand, whistleblowing affecting a "private" interest of the employer and employee. One author suggests that this distinction is "treacherous at best, and more than likely incoherent." The California Supreme court opined, "'public policy' as a concept is notoriously resistant to precise definition." Courts faced with whistleblowing cases have found this a difficult distinction to make.

Several courts have concluded that whistleblowing was not warranted because it affected a private rather than a public interest; this is so even though the whistleblowing had at least a

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277. See infra notes 284-90.
278. See id.
279. See id.
280. Gantt v. Sentry Ins., 824 P.2d 680, 687 (Cal. 1992). The court noted, "The difficulty, of course, lies in determining where and how to draw the line between claims that genuinely involve matters of public policy, and those that concern merely ordinary disputes between employer and employee." Id. at 684. The court further observed, "A public policy exception carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions strikes the proper balance among the interests of employers, employees and the public." Id. at 688.
282. See infra notes 284-90.
tenuous connection to a public interest. For example, a New Jersey appellate court affirmed the trial court’s judgment for the employer where the employer disputed the employee’s claim that elevated liver enzyme readings of patients participating in a new drug study should have been reported immediately to the FDA. The court characterized the dispute as “a difference of professional opinion.” In another New Jersey case, the company vice president recommended the employee’s termination for business reasons and the employee contended he was terminated for opposing the company’s distribution of contaminated tooth paste. On appeal, the court affirmed the summary judgment granted to the employer because no wrongful discharge claim was recognized for an employee voicing opposition to corporate policy. The court viewed the complaint as solely internal, with the employee not trained to determine whether the product was contaminated. In a New Mexico case, an employee reported to the employer that the store manager was using illegal drugs.

283. See infra notes 284-90.
285. Id. at 505. The court noted that:

[A] difference of professional opinion between an employee and those with the corporate decision making power is not a sufficient basis for a wrongful discharge cause of action. This is so even though the dispute arises from the employee’s well-intended and conscientious concern for potential harm to those who might be affected by the corporate conduct of which the employee objects.

The pertinent federal regulations simply do not require the immediate reporting espoused by plaintiff of that type of speculative harm.

Id.
287. See id. at 355.
288. See id. at 356-57.
289. See Garrity v. Overland Sheepskin Co., 917 P.2d 1382, 1389 (N.M. 1996). The court noted that:

This case does not involve an employee in a profession for which drug use would pose an immediate, identifiable risk to the public. Nor does the case involve an economic crime that directly injures the general public and that an employer can remedy immediately if made aware of the problem . . . .
The New Mexico Supreme Court affirmed the directed verdict for the employer because, although there was a clear mandate of public policy, the reporting of alleged drug use primarily benefited the employer and the employee rather than the public.\(^{290}\)

Positive law regulates countless aspects of the employer-employee relationship; the pervasiveness of this regulation indicates that the employer-employee relationship is already a matter of public concern. One might argue that court decisions determining the outlines of the public policy exception, such as the three cases described in the preceding paragraph, have public interest attached to them; this is so whether a particular court decides that the incident in the instant case does or does not fall within the public policy exception. Viewed from an economic perspective, all employment decisions affect the economy which in turn affects the public. One solution to the difficulty in separating public interests from private interests and finding a source in positive law is to limit employee terminations to those supported by just cause.\(^{291}\) A solution at the opposite end of the spectrum is to refuse to recognize any common law public policy exception to employment at will. This solution is adhered to by a handful of states.

At least twenty-six states recognize a common law public policy exception for whistleblowing. These twenty six states are Alaska,\(^{293}\) Arizona,\(^{294}\) Arkansas,\(^{295}\) California, Colorado,\(^{296}\) Connecticut,\(^{297}\)

\(^{290}\) See id.


\(^{292}\) See Schwab, supra note 280, at 1943. According to Schwab, the handful of states are New York, Georgia, Louisiana, and Mississippi. See id. at 1943 n.4.

\(^{293}\) See Knight v. American Guard & Alert, Inc., 714 P.2d 788, 792 (Alaska 1986) (recognizing that an action for breach of the covenant of good faith and fair dealing is enforceable, and although public policy theory is largely incorporated within the covenant of good faith and fair dealing, the appellate court could not determine whether public policy theory applied on the facts).


Hawaii,\(^{298}\) Illinois,\(^{299}\) Kansas,\(^{300}\) Kentucky,\(^{301}\) Maryland,\(^{302}\) Massachusetts,\(^ {303}\) Minnesota,\(^{304}\) Missouri,\(^{305}\) Nebraska,\(^{306}\) Nevada,\(^{307}\) New Jersey,\(^{308}\) New Mexico,\(^{309}\) Ohio,\(^{310}\) Oklahoma,\(^{311}\) Oregon,\(^{312}\) Pennsylvania,\(^{313}\) Rhode Island,\(^{314}\) Texas,\(^{315}\) Washington,\(^{316}\) and West Virginia.\(^{317}\) A few states\(^{318}\) and the District of Columbia\(^{319}\) do not

\(^{298}\) See Norris v. Hawaiian Airlines, Inc., 842 P.2d 634, 646 (Haw. 1992), aff'd, 512 U.S. 246 (1994). In this case an aircraft mechanic refused to certify an aircraft repair as requested by his supervisor and reported the problem to the Federal Aviation Authority. See id. at 638. The Hawaii Whistleblower's Protection Act was intended to protect an employee who whistle blows for the public good and the public policy of the Federal Aviation Act and federal aviation regulations is to protect the public from shoddy aircraft repair. See id. at 646; see also Parnar v. Americana Hotels, Inc., 652 P.2d 625, 631 (Haw. 1982).


\(^{304}\) See Nichols v. Metropolitan Ctr. For Indep. Living, Inc., 50 F.3d 514, 516 (8th Cir. 1995) (applying Minnesota law).


\(^{318}\) Those states are Indiana, North Carolina, South Dakota, and Wisconsin. For Indiana, see Campbell v. Eli Lilly & Co., 413 N.E.2d 1054, 1056 (Ind. Ct. App. 1980) (affirming summary judgment for employer where a pharmaceutical research team member had been terminated after reporting acts of misconduct by his superiors and questioning the safety of some drugs). In Campbell, the court noted that a "plaintiff must demonstrate that he was discharged in retaliation for either having exercised a statutorily conferred personal right or having fulfilled a statutorily imposed duty." Id.
recognize a whistleblowing public policy exception to employment at will.

As with state whistleblowing statutes, the contours of the exception vary widely. Those states recognizing the exception generally protect whistleblowing if the disclosure involves the violation of a constitutional provision, or of statutes, rules or regulations. For example, in a Connecticut case, the plaintiff, who had been quality control director and operations manager, could have been prosecuted for violating the Connecticut Uniform Food, Drug and Cosmetic Act if he had not reported "substandard raw materials and underweight components" to his employer. The Connecticut Supreme Court held that the trial court erred in striking plaintiff's complaint. In an Illinois case, the court pointed to the Illinois Constitution and the federal Occupational Safety and Health Act as two sources of public policy. In this case, an employee was discharged after reporting to the employer safety representative that the employee had found deteriorating insulation in his work area that was suspected of containing

For North Carolina, see Haburjak v. Prudential Bache Secs., Inc., 759 F. Supp. 293, 300 (W.D.N.C. 1991) (applying North Carolina law). In Haburjak, a stockbroker was discharged for reporting to her employer's manager insider trading by brokerage employees. See id. at 294. The court found that the public policy exception is limited to a situation where the employer affirmatively instructs the employee to violate the law. See id. at 300.

For South Dakota, see Peterson v. Glory House, 443 N.W.2d 653, 654-55 (S.D. 1989) (stating that the only public policy exception to the employment at will doctrine is for termination for refusal to commit a criminal or unlawful act).

For Wisconsin, see Hausman v. St. Croix Care Ctr., Inc., 558 N.W.2d 893, 897 (Wis. Ct. App. 1996) (stating that a whistleblower exception to the employment at will doctrine "has not been recognized in Wisconsin and is an issue that must be addressed by the supreme court or the legislature").

319. See Thigpen v. Greenpeace, Inc., 657 A.2d 770, 771 (D.C. 1995) (refusing the argument that the court should expand the public policy exception beyond an employee's refusal to violate law); Gray v. Citizens Bank, 602 A.2d 1096, 1097 (D.C. 1992) (invoking an employee who was allegedly discharged for reporting a fellow employees' illegal activities to employer. The dismissal of the action for wrongful discharge was affirmed with the court stating that the public policy exception does extend beyond an employee refusal to violate law).

320. See supra notes 293-317.


322. See id. at 388-89.

323. See id. at 389.


325. See id.
asbestos. On appeal, the court reversed the trial court’s dismissal of the employee’s complaint, concluding that the employee “sufficiently pleaded his discharge violated the clearly mandated public policy preventing the discharge of employees for reporting occupational health hazards.” In a second case from Illinois, the employer’s chief engineer reported a claimed fire hazard in an apartment building to the building manager and the city. The engineer claimed he was fired in retaliation. The appellate court reversed the trial court’s dismissal of the retaliatory discharge claim. In a Missouri case, employees at a fireworks production factory reported unsafe working conditions to their employer and to the United States Department of Labor. On appeal, the court reversed the trial court’s dismissal of the action, finding that the Missouri public policy exception to the employment at will doctrine did apply to the retaliatory discharge of employees for reporting Occupational Safety and Health Act violations. In an Oregon case, a nursing director was fired for threatening to report patient mistreatment by the nursing home administrator to the state agency responsible for enforcing the Oregon Nursing Home Patient’s Bill of Rights. The appellate court found that the trial court had erred in instructing the jury that the plaintiff had to prove patient abuse, holding that “an employee is protected from discharge for good faith reporting of what the employee believes to be patient mistreatment to an appropriate authority.” In another Oregon case, an employee maintenance worker reported dangerous conditions and potential physical abuse at a residential care center for the mentally disabled to the Oregon

326. See id. at 709.
327. Id. at 713.
328. See Prince v. Rescorp Realty, 940 F.2d 1104, 1105 (7th Cir. 1991).
329. See id.
330. See id.
331. See id. at 1110.
333. See id.
334. See id. at 344-46.
336. See id.
337. Id. at 24.
Mental Health and Developmental Disability Services Division.\textsuperscript{339} The division was a state agency responsible for reviewing the center’s compliance with state and federal law.\textsuperscript{340} On appeal, the court affirmed the jury verdict for the worker on the wrongful discharge claim.\textsuperscript{341}

Illinois, Missouri, Oklahoma, and Pennsylvania are among the twenty-six states recognizing a public policy exception to employment at will.\textsuperscript{342} Even so, these states have not recognized an exception in certain cases, even though a positive law basis existed.

Illinois courts have decided a handful of such cases. In a 1984 Illinois case,\textsuperscript{343} the court dismissed a lawsuit in which the flight engineer had sued for wrongful discharge for reporting violations of Federal Aviation Authority aircraft maintenance regulations.\textsuperscript{344} In a 1987 Illinois case,\textsuperscript{345} the state did not allow a public policy exception for whistleblowing even for violation of the Illinois insurance code because the injury was economic and did not “strike at the heart of a citizen’s social rights, duties and responsibilities.”\textsuperscript{346} In another Illinois case,\textsuperscript{347} in-house counsel had informed the company president that defective dialyzers shipped to it by its parent company would have to be reported to the FDA.\textsuperscript{348} The attorney made the report to the FDA after he was terminated.\textsuperscript{349} The Illinois Supreme Court affirmed a summary judgment for the company because extending the tort of retaliatory discharge to an in-house counsel might chill attorney-client communication, the in-house counsel had to report the defective dialyzers under the Illinois Rules of Professional Conduct or resign, the client has a right to discharge an attorney, and the in-house counsel was acting as an attorney rather than as a layperson.

\begin{itemize}
  \item \textsuperscript{339} See id.
  \item \textsuperscript{340} See id.
  \item \textsuperscript{341} See id. at 74.
  \item \textsuperscript{342} See supra notes 293-317.
  \item \textsuperscript{344} See id. at 386.
  \item \textsuperscript{346} Id. In Fowler, an insurance company supervisor was allegedly terminated for complying with provisions of the Illinois insurance code. See id. The court dismissed the claim because the insurance code was not sufficiently tied to public safety but was tied to the state’s socio-economic objectives. See id. at 699.
  \item \textsuperscript{347} See Balla v. Gambro, Inc., 584 N.E.2d 104, 106-10 (Ill. 1991).
  \item \textsuperscript{348} See id.
  \item \textsuperscript{349} See id.
\end{itemize}
in the incident. In 1996, an Illinois court affirmed a motion to dismiss granted to the employer furniture manufacturer where the employee had advised the employer that it was violating Interstate Commerce Commission regulations requiring written contracts with interstate contract carriers.

One Missouri court questioned whether all Federal Aviation Authority regulations were a source of public policy:

While we assume generally that regulations governing federal aviation safety are very important, and will often relate to a clear mandate of public policy, we cannot say that every federal “safety regulation” involves such a clear mandate.... The FAA’s regulation concerning a pilot’s responsibility and the “Code of Ethics” requirement that a pilot use his best judgment are not clear mandates which allow employees to fall within the public policy exception.... Vague regulations may not be sufficiently clear to make enforcement practicable through employment-related litigation. Those regulations not related to safety may have less significant public policy implications than those related to safety.

In a 1995 case, the Oklahoma Supreme Court ruled that a restaurant employee had no cause of action for wrongful discharge for reporting embezzlement by a fellow employee because the reported activity was proprietary and private to the employer rather than directly affecting the interests of the general public.

A 1996 Pennsylvania case involved the employee safety director “becoming aware” that blasting caps were being deposited into garbage containers at the business of one of the employer’s

350. See id.
353. Id. In Adolphsen, after the employee co-pilot/mechanic reported a violation of Federal Aviation Authority safety regulations to his supervisor and then to the employer chief executive officer, the employee’s supervisors allegedly harassed him into resigning. See id. On appeal, the court vacated the trial court’s dismissal of the employee’s petition and remanded to allow the employee to amend the petition to state a specific violation of FAA regulations reflecting a clear mandate of public policy. See id. at 339.
The employee informed the employer’s owner and state and local police but when the state police and the Bureau of Alcohol, Tobacco and Firearms searched the garbage containers no hazardous materials were found. On appeal, the court affirmed summary judgment for the employer because the employee was not under a duty to report and his actions were "overzealous." The court stated:

To state a public policy exception to the at-will-employment doctrine, the employee must point to a clear public policy articulated in the constitution, in legislation, an administrative regulation, or a judicial decision. Furthermore, the stated mandate of public policy, as articulated in the constitution, statute, or judicial decision, must be applicable directly to the employee and the employee’s actions. We have recognized a public policy exception only in extremely limited circumstances.

At least a few states of the twenty-six have decided that public policy does not necessarily need to be reflected in a constitutional provision, statute, rule, or regulation for the public policy exception to apply. The Arizona Supreme Court has recognized that public policy need not have a statutory basis, as has a Kansas court. The Arizona Supreme Court stated:

356. See id.
357. See id. at 176-77.
358. Id. at 175-76.
359. See infra notes 360-70 and accompanying text.
360. See Wagner v. City of Globe, 722 P.2d 250, 252 (Ariz. 1986). In Wagner, a police officer brought to the judge’s attention that the arrest of the individual was illegal and the arrestee had been detained eleven days more than the original sentence. See id. The officer was fired and protested the termination to the city council. See id. On appeal from summary judgment for defendant, the court found that summary judgment on the wrongful discharge claim was improper and stated that protecting civil rights of citizens from abuse furthers public policy. See id. at 256.
361. See Pilcher v. Board of County Comm’rs, 787 P.2d 1204, 1209 (Kan. Ct. App. 1990) (directing verdict for defendant was erroneous where county employee claimed she was wrongfully discharged because she was believed to be the source of information on the county’s “unsavory and untenable hiring practices” that were the basis of a newspaper article). The court noted:
So long as employees' actions are not merely private or proprietary, but instead seek to further the public good, the decision to expose illegal or unsafe practices should be encouraged. We recognize that there is a tension between the obvious societal benefits in having employees with access to information expose activities which may be illegal or which may jeopardize health and safety, and accepted concepts of employee loyalty. Nevertheless, we conclude that on balance actions which enhance the enforcement of our laws or expose unsafe conditions, or otherwise serve some singularly public purpose, will inure to the benefit of the public. The relevant inquiry is not limited to whether any particular law or regulation has been violated, although that may be important, but instead emphasizes whether some "important public policy interest embodied in the law" has been furthered by the whistleblowing activity.

Some states recognize professional ethic rules as the basis for the exception. The California Supreme Court has held that public policy to support a claim could be found in an attorney ethics rule mandating the action taken by the attorney or in an attorney ethics rule permitting attorney action so long as an exception to attorney client confidentiality allowed the action. The Colorado Supreme Court has allowed the Colorado State Board of Accountancy Rules and Regulations as a source of public policy.

The Palmer decision discusses discharging an employee for reporting a violation of the law pertaining to public health, safety, and the general welfare. We do not believe that those areas are exclusive in proving a claim for retaliatory discharge. If the matters reported in the Kansas City Times were true... the county was engaging in very questionable hiring practices which ultimately would have a detrimental effect on the general welfare of the taxpayers of Wyandotte County.

Id. at 1210; see also Palmer v. Brown, 752 P.2d 685, 685 (Kan. 1988) (involving a laboratory head who reported suspicions of Medicaid fraud to authorities. The court reversed the dismissal of the complaint as to the retaliatory discharge because termination for the good faith reporting of a serious infraction of the law concerning health, safety, or welfare is actionable).

363. See infra notes 364-66.
364. See General Dynamics Corp. v. Superior Court, 876 P.2d 487, 504 (Cal. 1994).
A New Jersey court has allowed the pharmacist code of ethics as a source of public policy.365

The public policy exception is directed to actions originating within the employer-employee relationship which have an effect on third parties. A number of courts seem to search for a public policy basis in positive law as a substitute for considering the effect of employee action on third parties outside the employment relationship; the underlying reason for the search for positive law is that embodiment in positive law protects the courts from criticism for trespassing into the province of the legislature. One might revisit the various court decisions involving employee whistleblowing. The majority of states set the standard for determining whether the information is of "whistleblowing quality" as the violation of a particular statute.367 A number of states require that public policy be embodied in positive law—primarily constitutions and statutes, but some states have allowed the public policy exception to be based on administrative regulations, codes of ethics and judicial decisions.368

See Rocky Mountain Hosp. & Med. Serv. v. Mariani, 916 P.2d 519, 525 (Colo. 1996). On appeal, the Colorado Supreme Court agreed with the Colorado Court of Appeals that a directed verdict for the employer should be reversed where the employee accountant was discharged after reporting accounting practices to her supervisors. See id. at 528. The court further noted that:

[In order] to qualify as public policy, the ethical provision must be designed to serve the interests of the public rather than the interests of the profession. The provision may not concern mere technical matters or administrative regulations. In addition, the provision must provide a clear mandate to act or not to act in a particular way. Finally, the viability of ethical codes as a source of public policy must depend on a balancing between the public interest served by the professional code and the need of an employer to make legitimate business decisions. . . . Thus, we hold that professional ethical codes may in certain circumstances be a source of public policy. However, we emphasize that any public policy must serve the public interest and be sufficiently concrete to notify employers and employees of the behavior it requires.

Id. at 525.

See Kalman v. Grand Union Co., 443 A.2d 728, 731 (N.J. Super. Ct. App. Div. 1982) (holding that where a pharmacist ordered by her employer to close the pharmacy section of a store on July 4, instead complied with the state Board of Pharmacy and kept pharmacy open, that summary judgment for employer is reversed where employer's order would have violated state statute, state administrative rules and the pharmacist code of ethics).

See supra notes 297-341 and accompanying text.

See supra notes 364-66 and accompanying text.
Most states have chosen a middle ground between allowing employee termination only for just cause and refusing to recognize any public policy exception to employment at will. The public versus private distinction is most problematic in those states whose public policy exception is narrow and where courts have allowed the exception only if found in a constitution or a state statute. Public policy does not include a technical violation of a statute but should include more than the statute, especially when there is an imminent and substantial harm to a third party. A statute makes it relatively easy to draw the line, but there are instances in which an imminent and substantial risk to public health or safety is not covered by a statute. Using state statutes and constitutional provisions as the sole basis for the public policy exception is a shortcut that can lead to unjust results. On one hand, employee whistleblowing which discloses substantial safety or health risks to the public should fall within the public policy exception even though the disclosure was not based on a public policy interest embodied in a state statute. On the other hand, employee whistleblowing which discloses a minor statutory violation not affecting public health or safety or any other fundamental interest may not be the type of disclosure which the public policy exception should protect.

The standard that information disclosed by whistleblowing concern the violation of a particular statute is both underinclusive and overinclusive. If the benchmark for allowing whistleblowing is harm to the public, it is illogical for a court to refuse to protect whistleblowing merely because the public policy is not directly reflected in legislative enactment. For example, an Illinois court refused to protect disclosure of alleged safety and security violations at a nuclear plant where the statute which would have protected the disclosure was not yet in effect when the disclosure occurred; a West Virginia court refused to protect an airline employee who reported an alleged safety violation where the reported evidence supported a violation of federal rather than state

369. See McKay v. Pinkerton's Inc., 607 N.E.2d 237, 242 (Ill. App. Ct. 1992). In this case, a security guard at a nuclear power plant reported alleged safety and security violations to the plant owner. See id. at 239. On appeal after the motion to dismiss was granted in favor of defendants, the court held that there was no cause of action for wrongful discharge where the statute protecting employees who report nuclear hazards was not in effect until after the guard was terminated and there was no other clearly mandated public policy. See id. at 240.
Exclusive reliance on legislative enactment is illogical because there are various reasons for the legislature not to act. Victims may not be protected by legislation where they do not have a strong lobby in the legislature; two historically under-represented categories of potential victims are children and minorities. The legislature may not have dealt with a problem for lack of time in the legislative session or because the problem is such a new one that it has not come to the legislature's attention.

C. Wigand as Whistleblower

Some would claim that in the past four years, the news media has been painting an unrealistic picture in black and white, making Wigand out to be something of a hero. B&W has accused CBS of


371. See supra notes 7-9 and accompanying text. The following are additional examples of how Wigand is treated favorably, both in comments made about him by the media and in the number of positive quotations about him included in the media. Mike Wallace asked about Wigand's reactions to his whistleblowing in a 60 Minutes interview. See 60 Minutes—Profile: Jeffrey Wigand, Ph.D.; Jeffrey Wigand Discloses Information on Brown & Williamson and Attempts Are Made to Rebut the Claims (CBS television broadcast, June 22, 1997), available in 1997 WL 7900021. Wallace asked Wigand, "You wish you hadn't blown the whistle?" Id. Wigand responded:

There are times I wish I hadn't done it, but there are times that I feel compelled to do it. I—if you ask me if I would do it again or if it—I think it's worth it, yeah, I think it's worth it. I think in the end people will see the truth. . . . I felt an obligation to tell the truth. There were things I saw, there were things I learned, there was things I observed that I felt—that need to be told. The focus continues to be on what I would call systematic and aggressive tactics to undermine my credibility and my—some of my personal life.

Id. More recently, Wigand commented, "My reputation has been dragged through the mud. . . . In the process, my family life has fallen apart. . . . [But] I can honestly state that I have no regrets about my decision to go public. Indeed, I want to emphasize that I have found an unexpected happiness and joy in adversity." Weinstein, supra note 8, at 16.

B&W was forced to agree to drop its suit against Wigand as a condition of the June 20, 1997 settlement. See Accord Spells Relief for Whistle-Blower, NEW ORLEANS TIMES-PICAYUNE, June 21, 1997, at A1. After B&W agreed, Florida Attorney General Bob Butterworth referred to Wigand as "a true American hero." Id. Wigand commented, "That's a tremendous relief for me. . . . I can start putting my life back together." Id.

Mississippi Attorney General Mike Moore stated, "Jeffrey's testimony is
not being objective; the accusation is perhaps rightly made, because CBS has agreed to indemnify Wigand and has paid his attorneys' fees. Instead of being black and white, the picture contains many gray areas. The states involved in tobacco litigation have been jumping on the politically correct bandwagon to condemn the tobacco industry. After forty years, the tide seems to have turned against the tobacco industry even though everyone has known for years that smoking is bad for one's health; "[i]n 1604, King James I of England characterized smoking as socially 'loathesome' and 'daungerous to the lunges [sic].’" Now almost two-thirds of Americans share a negative view of the tobacco industry. In contrast, some would claim that the government has gone too far in attempting to regulate tobacco; if tobacco is regulated, alcohol or high fat-content foods might be next. The going to be devastating, Mike, to the tobacco industry, so devastating that I fear for his life. . . . I'm very serious. The information that Jeffrey has, I think, is the most important information that has ever come out against the tobacco industry." 60 Minutes, supra. At the news conference announcing the June 20, 1997 settlement, Moore stated:

We just had a heck of a fight about what we think is a true American hero, Jeffrey Wigand. One piece of this industry wanted to continue to punish Jeffrey Wigand and we were willing to walk away from this deal completely—completely—if they didn't concede. They conceded. And Jeffrey Wigand will be free from the attacks of Brown & Williamson's tobacco companies in the future and we're very proud of that.

Id. 372. See 60 Minutes, supra note 3. During a deposition June 16, 1997, Wigand was represented by CBS-paid attorneys, John Aldock and Laura Wertheimer. See Joe Ward, B&W Attorneys Resume Questioning of Wigand, COURIER-J. (Louisville), June 17, 1997, at 4A.


375. See John Kennedy, Tobacco Troubles Starting to Spread; Other Businesses Fear Copycat Lawsuits Seeking Huge Amounts of Money Will be Filed Against Them, ORLANDO SENTINEL, Aug. 3, 1997, at A1. A Washington "milk-a-holic" filed a lawsuit against dairy farmers, claiming they should be held liable because his milk consumption caused his stroke. See id. A recent article on the editorial page of The Wall Street Journal was accompanied by a cartoon showing the McDonald's clown with a noose around its neck and hands tied behind its back sitting astride a race horse. See Mark F. Bernstein, A Big Fat Target, WALL ST. J., Aug. 28, 1997, at A14. Actor
addictiveness of tobacco is something obvious that the government does not need to tell the smoker.\textsuperscript{376}

The current campaign against the tobacco industry moves in great contrast to an earlier emphasis in this country on individualism and the strength of the free market system. Florida is one of the states suing the tobacco industry, yet Florida's argument that it should be reimbursed Medicaid costs seems a little hypocritical. The state already pockets high cigarette taxes, which totaled $423 million in the past fiscal year. That amount is estimated to exceed the Medicaid funds spent to treat smoking-related health problems.\textsuperscript{377} The new campaign might be seen as organized blackmail. The state wants even more money in exchange for limiting the liability of the tobacco industry. In addition, the tenor of the new campaign retreats from the country's tradition of individualism, absolves smokers of liability, and allows them to deny any personal responsibility for their actions. One recent study concludes that health care costs are lower where people smoke; although the cost to treat smokers is higher than the cost of treating non-smokers, smokers tend to die earlier, thereby avoiding the higher costs of treating more elderly individuals.\textsuperscript{378}


\textsuperscript{378} See Jan J. Barendregt et al., \textit{The Health Care Costs of Smoking}, \textit{337 New Eng. J. Med.} 1052, 1052 (1997). The authors noted:

Health care costs for smokers at a given age are as much as 40 percent higher than those for nonsmokers, but in a population in which no one smoked the costs would be 7 percent higher among men and 4 percent higher among women than the costs in the current mixed population of smokers and nonsmokers. If all smokers quit, health care costs would be lower at first, but after 15 years they would become higher than at present. In the long term, complete smoking cessation would produce a net increase in health care costs, but it could still be seen as economically favorable under reasonable assumptions of discount rate
The "wrongness" of the tobacco industry's actions was not that clear until recently. When Mississippi's Attorney General Mike Moore filed the first state reimbursement suit against the tobacco industry, he seemed to have little chance of winning. From the outset, Wigand's actions seemed clearly wrong. He allegedly breached several confidentiality agreements he had signed with B&W. An attorney for B&W stated, "Wigand had four confidentiality agreements, violated them, and then went on television and lied." Wigand profited handsomely from one of his first disclosures about the tobacco industry, earning $12,000 to analyze some Philip Morris documents for 60 Minutes.

The intense involvement of B&W attorneys in scientific matters can be looked at from two different perspectives. On one hand, the attorneys could be seen as conscientious, offering advice on legal issues; under that theory, the attorneys were working with no more information than what was generally available in the scientific community at the time. On the other hand, the attorneys could be seen as pretending to give normal legal advice, but in reality be an essential part of a tobacco industry conspiracy to keep crucial information concerning health risks hidden from the public. Dicta in a recent case involving B&W highlights one of the two perspectives:

If the B&W strategy were accepted, those seeking to bury their unlawful or potentially unlawful acts from consumers, from other members of the public, and from law enforcement or regulatory authorities could achieve that objective by a simple yet ingenious strategy: all that would need to be done would be to delay or confuse any charges of health hazard, fraud, corruption, overcharge, nuclear or chemical contamination, bribery, or other misdeeds, by focusing instead on inconvenient documentary evidence and labeling it as the product of

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Id.

379. See Helm, supra note 9, at 1A ("Tobacco lawyers, fighting now on many fronts, initially dismissed Moore's suit as a gimmick and a contorted abuse of tort law.").

380. Id.

381. See 60 Minutes, supra note 3.

theft, violation of proprietary information, interference with contracts, and the like. The result would be that even the most severe public health and safety dangers would be subordinated in litigation and in the public mind to the malefactor’s tort or contract claims, real or fictitious.883

Wigand’s annual salary at B&W was in excess of $300,000 and he headed a department of 243 people, with a budget of over thirty million dollars.884 Wigand claims he was hired by B&W to work on a safe cigarette project but the project was eliminated after Wigand joined B&W.885 Wigand states that he began to ask questions

883 Maddox v. Williams, 855 F. Supp. 406, 415 (D.D.C. 1994). Although the District of Columbia Circuit Court of Appeals affirmed, the appellate court chastised the lower court for its seemingly partisan comments. See Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 411-12 (D.C. Cir. 1995). Maddox arose out of a state court case in which B&W’s law firm sued the firm’s former paralegal for removing copies of B&W documents while the paralegal was engaged in document production for the firm. See id. The copies became available to the media and to Congress. See id. A University of California at San Francisco professor of medicine, Stanton A. Glantz, wrote:

Tobacco is the leading preventable cause of death: cigarettes and other tobacco products kill 420,000 American smokers and 53,000 non-smokers every year. This toll exceeds the deaths resulting from alcohol abuse, AIDS, traffic accidents, homicides, and suicides combined. Nevertheless, the tobacco industry continues to promote and sell its products, unhampered by any meaningful government regulation except for mostly local restrictions designed to protect nonsmokers from the toxins in secondhand tobacco smoke. In fact, the tobacco industry is unique among American and worldwide industries in its ability to forestall effective government regulation and to hold effective public health action at bay while marketing its lethal products.


884 See Brenner, supra note 2, at 176.

885 See id. at 178. Wigand told 60 Minutes:

They were looking to reduce the hazards within cigarettes, reduce the carcinogenic components—or—or list the carcinogens that were within the tobacco products... People will continue to smoke no matter what, no matter what kind of regulations. If you can provide for those who are smoking and who need to smoke something that produces less risk for them—I thought I was going to be making a difference...

60 Minutes, supra note 3.

Wigand became frustrated by the lawyers’ intervention and presence at major scientific meetings. See id. Wigand said in response to his questions, he was told by then president and later B&W chief executive officer Thomas Sandefur,
concerning B&W research and the questions negatively impacted his future with B&W. He admits that he “became increasingly vocal,” “sounding off at meetings.” His evaluations after 1991 reflected that he had “a difficulty in communication.” B&W claims he was fired “for telling half-truths and for an abusive style with coworkers.”

When B&W fired Wigand, Wigand received severance pay and continued health benefits. After leaving B&W, Wigand complained to a friend at B&W about his severance benefits; Wigand claims that, in response, B&W sued him for breach of contract. To keep his medical benefits, Wigand “reluctantly signed an onerous, lifelong confidentiality agreement [in November 1993] so stringent that he could be in violation if he discussed anything about the corporation.” The agreement barred Wigand from disclosing “any and all information, whether privileged, confidential, trade secrets or any other information acquired by you.” According to the company, “Wigand cannot possibly testify as a ‘tobacco’ expert . . . without violating the terms of his various agreements with B&W.”

After Wigand left B&W, CBS’ 60 Minutes used Wigand as a confidential expert and later persuaded Wigand to be the subject of a 60 Minutes interview. Mike Wallace interviewed Wigand in August 1995 after Wigand received CBS’s written promise to indemnify him if B&W sued him for libel. The interview was scheduled to be broadcast in November; however, CBS cancelled the interview for fear of liability and did not name Wigand as the interviewee.

“I don’t want to hear any more discussion about a safer cigarette. . . . We pursue a safer cigarette, it would put us at extreme exposure with every other product. I don’t want to hear about it anymore.” Id.

386. See Brenner, supra note 2, at 177.
387. Id.
388. Id. at 178.
389. Helm, supra note 9, at 1A.
390. See 60 Minutes, supra note 3.
391. See id.
393. Id.
394. Id.
395. See 60 Minutes, supra note 3.
396. See Howard Kurtz “60 Minutes” Team Sticks Out Rough Spots; Despite Dropping Ratings - and Sour Moods, CBS’s Original Newsmagazine is Riding Out the Storm, AUSTIN AM. STATESMAN, Dec. 24, 1995, at 5.
397. See Brenner, supra note 2, at 208. On September 12, 1995, CBS general
Minutes interviewee on November 17, 1995 when a newspaper article identified Wigand as the former tobacco executive whistleblower. CBS agreed to indemnify Wigand after his identity was leaked to the press.

On November 21, 1995, B&W sued Wigand in Jefferson County, Kentucky Circuit Court claiming he had breached an employment agreement, a confidentiality agreement, a letter of agreement, and a settlement agreement ("the Agreements"). B&W claimed that the Agreements barred Wigand from disclosing information or documents Wigand obtained while employed by B&W or in connection with his B&W employment. More specifically, B&W claimed that the following actions violated the Agreements:

(1) Wigand has offered his services as an expert witness in two separate civil suits; (2) Wigand has given The Wall Street Journal and the Washington Post confidential B&W documents; (3) Wigand has disclosed confidential information and trade secrets in an interview with 60 Minutes; and (4) Wigand has cooperated with the counsel counselled 60 Minutes executives against airing the Wigand interview for fear of B&W suing CBS for tortious interference with Wigand's confidentiality agreement. See id. A November 9, 1995 New York Times article stated that the 60 Minutes interview with the former tobacco executive would not be shown for fear of CBS being sued for tortious interference with contractual relations. See Brown & Williamson Tobacco Corp. v. Wigand, N.Y.L.J., Mar. 1, 1996, at 26. During the 60 Minutes November 12, 1995 broadcast, Mike Wallace announced that it could not broadcast its interview with an unnamed former executive for fear of potential liability. See 60 Minutes—Profile: Cigarettes; CBS Says No To Interview Regarding Tobacco Industry Due To Possible Lawsuit (CBS television broadcast, Nov. 12, 1995), available in 1995 WL 2729850.


399. See 60 Minutes, supra note 3.


401. See id.
Mississippi Attorney General in a Mississippi civil case.\(^{402}\)

Wigand's August 1995 interview and a subsequent interview were finally shown on *60 Minutes* on February 4, 1996.

What did Wigand disclose? He disclosed that tobacco executives had admitted privately that nicotine is addictive,\(^{403}\) that tobacco causes cancer and other health problems, that the tobacco company manipulates nicotine levels,\(^{404}\) that additives to the

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\(^{403}\) See *60 Minutes*, supra note 3. Wigand reported that B&W's public stance on whether nicotine is addictive was in sharp contrast to private statements by B&W executives. See *id.* B&W has publicly defended itself by arguing that nicotine is not addictive and smoking is a matter of free choice. See *id.* Gordon Smith, a B&W attorney, stated:

\-[I]t's absurd to suggest that tobacco is any way like cocaine in terms of addiction. It's absolutely absurd to suggest that. Brown & Williamson makes a lawful product. They sell it and make it in a lawful way. . . .

\-[F]ifty million people choose to use tobacco and smoke. . . . People choose to smoke. People choose to stop smoking. . . . It's their choice. It's a lawful product. It's marketed and manufactured lawfully.

*Id.*

During an April 1994 congressional hearing, the chief executives of the seven largest United States tobacco companies testified. See Brenner, *supra* note 2, at 206. Sandefur then testified, "I believe that nicotine is not addictive." *Id.* Wigand stated, "I believe he [Sandefur] perjured himself." *60 Minutes*, supra note 3. B&W executives privately acknowledged the addictive effect of nicotine. See *id.* "There have been numerous statements made by a number of officers, particularly Mr. Sandefur, that we're in the nicotine-delivery business." Alix M. Freedman, *The Deposition: Cigarette Defector Says CEO Lied to Congress About View of Nicotine; Wigand claims B&W Chief "Frequently" Mentioned Its Addictive Properties; Firm Calls Charges "Fantasy"*, WALL ST. J., Jan. 26, 1996, at A1.

\(^{404}\) See Alix M. Freedman, *"Impact Booster": Tobacco Firm Shows How Ammonia
company's products present health dangers, and that the company used strategies to keep that information private.

Spurs Delivery of Nicotine/Brown & Williamson Papers Claim Wide Industry Use of Additive in Cigarettes, WALL ST. J., Oct. 18, 1995, at A1. Wigand has testified that B&W used ammonia additives as the "primary method of managing or manipulating nicotine delivery" by converting nicotine into "free nicotine" and used acetaldehyde as an "impact booster," both additives enhancing the nicotine effect on smokers. See id. A 1991 B&W handbook for leaf blenders and product developers:

[E]xplains how ammonia scavenges nicotine from tobacco and converts it into a form with greater impact on smokers. Nicotine in this 'pharmacologically active' or 'free' form has a more powerful effect than nonammoniated nicotine because it gets absorbed more quickly into a smoker's bloodstream.... [T]hus, by harnessing ammonia-producing additives, a manufacturer can enhance nicotine delivery without actually adding nicotine.

Id. Wigand explained, "There's extensive use of this technology, which is called ammonia chemistry, that allows for nicotine to be more rapidly absorbed in the lungs and, therefore, affect the brain and central nervous system." 60 Minutes, supra note 3.

405. See 60 Minutes, supra note 3. Glycerol, added to cigarettes to keep the cigarettes moist, turns into acrolein when burned. See id. Research has shown that acrolein "has been shown to interfere with the normal clearing of the lungs" and "acts like a carcinogen." Id. Wigand also questioned the use of coumarin in Sir Walter Raleigh pipe tobacco. See id. Coumarin was added to tobacco to give it a "vanilla-like" flavor. See id. Scientists discovered that it caused liver damage when tested on rats and dogs, and they suspected it was carcinogenic. See GLANTZ ET AL., supra note 383, at 221. In a deposition, Wigand stated, "I was concerned of the continued use of coumarin in pipe tobacco after the coumarin had been removed from cigarettes because of the FDA not allowing the use of coumarin in foods with additives. The reason why it stayed in pipe tobacco is the removal would change the taste of the pipe tobacco and, therefore, affect sales." Id. A 1992 National Toxicology Program report described the carcinogenic effect of coumarin, an additive in Sir Walter Raleigh pipe tobacco. See Brenner, supra note 2, at 178-79. Wigand commented:

And when I came on board at B&W, they had tried to... transition from coumarin to another similar flavor that would give the same taste. And it was unsuccessful... I wanted it out immediately. And I was told that it would affect sales and I was to mind my own business. And then I constructed a memo to Mr. Sandefur indicating that I could not, in conscience, continue with coumarin, a product that we now knowingly have documentation that is [a] lung-specific carcinogen... I sent the document forward to Sandefur. I was told that—that we would continue working on a substitute, and we weren't going to remove it because it would impact sales. And that's—that was his decision.

60 Minutes, supra note 3.

406. See Brenner, supra note 2, at 174. Wigand discovered that B&W attorneys
D. Wigand and the “Typical” Whistleblower: How Does Wigand Compare to the “Typical” Whistleblower?

“Internal whistleblowing” involves reporting a wrongdoing to a superior within the organization while “external whistleblowing” involves reporting a wrongdoing to a government agency, to a law enforcement authority, or to the media. A whistleblower may blow the whistle internally, blow the whistle externally, or blow the whistle externally after first having blown it internally if the wrongdoing is not corrected. External whistleblowers “do not differ significantly” from internal whistleblowers.

Whistleblowing is usually a loyal rather than a disloyal act. Research shows that whistleblowers “are long-time employees, fairly high in the organization, who have a strong sense of organizational loyalty.” Most employees refrain from reporting a wrongdoing; employees are more likely to blow the whistle where the wrongdoing is serious and the whistleblower has “direct evidence” of the wrongdoing. The “primary motivation” of the whistleblower is to “correct wrongdoing.” “[I]ncidents of groundless or spiteful whistleblowing, or whistleblowing motivated only by personal gain, are rare.”

limited the amount of sensitive scientific information available. See id. This included “document management”—having the information “shipped offshore,” removing “deadwood”—B&W attorney’s counsel not to “make any notes, memos, or lists,” and attorney editing of documents. See id. Much of the company’s research, including nicotine research was done overseas. See id. Wigand’s observations were supported by a January 1990 B&W internal memo which included the following suggestions for document management:

Educating scientists in each research centre about document writing/document creation. Regular lawyer review and audits of scientific documents produced in each company. Arranging a system to ensure that all research-related conference minutes involving representatives of more than one group are vetted by the lawyer before the minutes are sent out.

Memo Details Effort to Restrict Tobacco Info, ORLANDO SENTINEL, July 18, 1996, at A3.

This “document management” designed to limit available information contrasts with the tobacco industry’s claim that it commits itself to internal and external research to determine tobacco’s health effects. See GLANTZ ET AL., supra note 383, at 2.

408. Id. at 300-01 (footnote omitted).
409. See id. at 303.
410. See Callahan & Dworkin, supra note 245, at 166.
411. Id.
Internal whistleblowing is usually preferred by the employee and by the organization. Internal whistleblowing gives the organization the opportunity to correct the wrongdoing, and a positive response from the organization may elevate the status of the whistleblower within the organization. Research shows that most external whistleblowing follows internal whistleblowing. External whistleblowing to the media is "seldom" accomplished by private employees.

External whistleblowing to the government is protected under many state whistleblowing statutes while external whistleblowing to the media is not. External whistleblowing to the government is a possible second step if internal whistleblowing fails to receive a positive response. However, a sophisticated whistleblower who does not believe external whistleblowing to the government will correct the wrongdoing is likely to do so to the media. An internal whistleblower to whom the organization has not been responsive is likely to blow the whistle to the media if: (1) the organization is dependent on the wrongdoing; (2) the organization is not receptive to dissent; and (3) the wrongdoer is influential within the organization. Whistleblowing is less likely where only one of the first two factors are present. Whistleblowing to the media likely involves wrongdoing which occurs more often and concerns more money than whistleblowing to another recipient; whistleblowing to the media is also "much more likely" where the wrongdoing involves "health or safety."

The fear of retaliation may deter whistleblowing; but if the organization retaliates against the whistleblower for internal whistleblowing, the whistleblower will likely blow the whistle externally. A minority of whistleblowers are retaliated against by their organizations, but the organization is more likely to retaliate if the whistleblowing is external and retaliation is more likely where management discourages internal reporting of a wrongdoing. Management correction of a wrongdoing reported by a

412. See Dworkin & Callahan, supra note 241, at 304.
413. See Dworkin & Callahan, supra note 85, at 395.
414. See Dworkin & Callahan, supra note 241, at 301.
415. See Callahan & Dworkin, supra note 245, at 167.
416. See id. at 165-66.
418. See Callahan & Dworkin, supra note 245, at 178-79.
419. See id.
420. See Dworkin & Callahan, supra note 85, at 301-02.
whistleblower is not likely to be reported in the media; most media reports involve a whistleblower who has been retaliated against or management failure to correct a wrongdoing identified by a whistleblower. 421

Research shows that the organization may respond to allegations of organizational wrongdoing in two different ways. The organization may either try to enhance the organization's image or the organization may try to discredit its accuser. In the "enhancement of self" strategy, organizations emphasize that:

(a) they must remain independent of special interest groups; (b) their current policy is "fair and just"; or (c) that they attempted to communicate with the accusers. In the "derogation strategy," the organization's spokespersons claim (a) the accuser's allegations are untrue; (b) the accusers don't understand the business; (c) their organization has been unfairly singled out; or (d) the accuser's motivations were devious. 422

Wigand closely matches the profile of the typical whistleblower. He is the highest ranking official from the tobacco industry to blow the whistle; 423 he is a scientist who had specific responsibility for research, the area associated with the disclosure, possessed relevant information, and had the expertise to evaluate the information. 424 He first blew the whistle internally by voicing his concerns to B&W's president and speaking up in meetings. 425 Wigand encountered the three factors making him more likely to blow the whistle to the media. 426 Wigand reported practices vital to the survival of the tobacco industry; B&W is very dependent on the arguments that tobacco is not addictive, and it is funding research to evaluate tobacco's safety and health risks. 427 B&W has shown in its vigorous and costly defense of anti-tobacco litigation that it is

421. See id. at 394.
423. See supra notes 384-406.
424. See id.
425. See id.
426. See id.
427. See id.
hostile to dissent.\textsuperscript{428} Top management is directly involved in the "wrongdoing," having constructed B&W's line of defense.\textsuperscript{429} Additionally, the potential exposure of B&W involves great sums of money, and the "wrongdoing" is continuous and concerns the public's health and safety.\textsuperscript{430} Wigand's major claims were that the additive, coumarin, a known carcinogen, was added to pipe tobacco for taste,\textsuperscript{431} ammonia was added to cigarettes to boost the delivery of nicotine,\textsuperscript{432} and that B&W's chief executive officer perjured himself before Congress in stating that tobacco was not addictive.\textsuperscript{433} The alleged wrongdoing involves health and safety.\textsuperscript{434} Annually, over 400,000 deaths are attributed to smoking.\textsuperscript{435} B&W has adopted the derogation strategy of discrediting Wigand in dealing with Wigand's accusations.\textsuperscript{436}

IV. PUBLIC POLICY EXCEPTION TO CONFIDENTIALITY AGREEMENTS

A. Unconscionability and Public Policy

Basic contract principles dictate that a contract or a contract term may be unenforceable because of unconscionability or because a term is contrary to public policy.\textsuperscript{437} However,

\textsuperscript{428} See id. For example, in another B&W case, the judge noted:

One may well doubt, to put it charitably, that B&W would be mounting a tremendous and costly effort, in Kentucky and in the District of Columbia, in proceedings against members of a congressional committee and against the mass of the media, if the documents at issue did not present the proverbial "smoking gun" evidencing the company's allegedly long-held and long-suppressed knowledge that its product constitutes a serious health hazard.


The costly tobacco industry defense has been estimated to cost $600 million annually. See Suein L. Hwang & Milo Geyelin, Tobacco Pact Will Enrich Two Law Firms, WALL ST. J., Dec. 3, 1997, at A2.

\textsuperscript{429} See supra notes 384-406.

\textsuperscript{430} See id.

\textsuperscript{431} See id.

\textsuperscript{432} See id.

\textsuperscript{433} See id.

\textsuperscript{434} See id.

\textsuperscript{435} See id.

\textsuperscript{436} See id.

\textsuperscript{437} See RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981). This section, entitled "Unconscionable Contract or Term," provides:
“unconscionability” lacks a precise definition to aid a court reviewing a challenged contract.\textsuperscript{438}

One may capture the essence of unconscionability by reading the definitions of unconscionability fashioned by the courts. An early definition of an unconscionable contract was a “bargain... such as no man in his senses and not under a delusion would make on one hand, and as no honest and fair man would accept on the other.”\textsuperscript{439} Another early definition of an unconscionable contract

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If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

\textit{Id.}


Many unconscionability cases arise in connection with the sale of goods and are decided under the Uniform Commercial Code. Section 2-302 of the Uniform Commercial Code allows a court much leeway in holding a contract unconscionable. It provides:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.


\textsuperscript{439} Hume v. United States, 132 U.S. 406, 411 (1889) (quoting Earl of Chesterfield v. Janssen, 28 Eng. Rep. 82, 100 (1750)).
was one containing "an inequality so strong, gross and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it." In a famous 1948 case, Campbell Soup Company sued a carrot farmer and asked a court to specifically enforce its contract with the farmer. Because of short supply, the contract carrots had risen astronomically in price from the contract price of $30 per ton to $90 per ton, and the farmer did not want to sell Campbell the carrots at the low contract price. The court noted the many one-sided provisions contained in the form contract, all of which ran in favor of Campbell. One of the provisions allowed Campbell to reject the carrots and then prohibited the grower from selling the carrots to a third party without Campbell's permission. The court refused to grant specific performance and stated, "We think it is too hard a bargain and too one-sided an agreement to entitle the plaintiff to relief in a court of conscience." In a 1965 case, a court stated, "Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." In a 1994 dissent, a judge argued, "If the contract . . . is not substantively unconscionable, it is hard to imagine one that is. The agreement is 'shocking to the conscience,' 'monstrously harsh,' 'exceedingly calloused,' or whatever other term that has ever been used in case law to describe an unconscionable contract."

"Public policy" is similarly imprecise. An English case from the first quarter of the nineteenth century aptly describes the indeterminate nature of public policy. The English court stated, "[P]ublic policy is 'a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you

441. See Campbell Soup Co. v. Wentz, 172 F.2d 80, 81 (3d Cir. 1948).
442. See id. at 82.
443. See id. at 83.
444. See id.
445. Id.
447. Id.
449. Id.
from the sound law. It is never argued at all but when other points fail.™

Section 178(1) of the Restatement (Second) of Contracts states, "A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms." The United States Supreme Court has also recognized that a court must balance the challenged contractual provision against the public policy detrimentally affected if the provision were enforced. The Court stated, "[A] promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by the enforcement of the agreement."3

The following discussion of public policy is from Henningsen v. Bloomfield Motors, Inc. In Henningsen, Mrs. Henningsen was driving an almost brand new Chrysler car when the car ran off the road and crashed into a sign and a brick wall because of a steering malfunction. The Henningsens had taken possession of the car ten days earlier, and the odometer read 468 miles. The written Chrysler warranty tracked the language of the Automobile Manufacturers Association, at a time when most car manufacturers were members of the association. The warranty obligated Chrysler to replace defective parts for the earlier of the first ninety days or 4,000 miles after the Henningsens shipped the car to the Chrysler factory at the Henningsens' expense; the determination of a defective part was at Chrysler's discretion. The Chrysler warranty disclaimed any other warranty, including an implied warranty of merchantability. The court stated:

453. Id.
455. See id. at 75.
456. See id.
457. See id. at 78, 87. The court noted, "General Motors, Inc., Ford, Chrysler, Studebaker-Packard, American Motors, (Rambler), Willys Motors, Checker Motors Corp., and International Harvester" were members of the association, and for 1958 the first three manufacturers accounted for 93.5% of car production. See id. at 87.
458. See id. at 74.
459. See id. at 84.
Public policy is a term not easily defined. Its significance varies as the habits and needs of a people may vary. It is not static and the field of application is an ever increasing one. A contract, or a particular provision therein, valid in one era may be wholly opposed to the public policy of another. . . . Courts keep in mind that principle that the best interests of society demand that persons should not be unnecessarily restricted in their freedom to contract. But they do not hesitate to declare void as against public policy contractual provisions which clearly tend to the injury of the public in some way. . . . [W]e are of the opinion that Chrysler’s attempted disclaimer of an implied warranty of merchantability and of the obligations arising therefrom is so inimical to the public good as to compel an adjudication of its invalidity.

Unconscionability and public policy are related theories courts may use to hold contracts unenforceable. In fact, the two theories may overlap at times. Unconscionability may concern either society’s interest or the interest of one of the parties, while public policy concerns society’s interest. Henningens and Campbell Soup illustrate the overlap between unconscionability and public policy. While the Henningens court spoke in terms of public policy, the warranty disclaimer could just as well have been invalidated as unconscionable. The disclaimer was unconscionable as to the Henningsens under any one or all of the above case law definitions of unconscionability because the bargain it drove was too hard. Likewise, the court easily held the disclaimer contrary to public policy because it was part of a standardized form contract of adhesion offered by Chrysler on a take it or leave it basis and

460. Id. at 94-95.
461. See supra notes 437-60.
462. See RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. a. (1981). The Restatement specifically notes: “[T]he policy [against unconscionable contracts or terms] . . . overlaps with rules which render particular bargains or terms unenforceable on grounds of public policy.” Id. Frank P. Darr, in Unconscionability and Price Fairness, 30 Hous. L. Rev. 1819 (1994), suggested that “the purpose of unconscionability is to allow the courts to enforce the community’s sense of commercial morality.” Id. at 1849.
463. See supra notes 437-60.
464. See supra notes 441-60.
465. See Henningens, 161 A.2d at 94-95.
466. See id.
presumably used by the rest of the major car manufacturers.\textsuperscript{467} Thus, the disclaimer impacted on the parties to the 	extit{Henningsen} transaction, but also on an interest of society. The \textit{Campbell Soup} court invalidated the carrot contract because of unconscionability,\textsuperscript{468} but could have stated just as well that it was refusing to enforce the contract because it was contrary to public policy. The \textit{Campbell Soup} contract was a standardized form contract offered to farmers on a take it or leave it basis.\textsuperscript{469}

\textbf{B. A Proposed Test for Determining the Enforceability of Confidentiality Agreements}

What would the hypothetical perfect confidentiality agreement look like? It would protect the employer against disclosure of trade secrets and similar information but would allow the employee to disclose information concerning general knowledge and skills. The reasonable expectation is that the confidentiality agreement will protect the types of things commonly protected as trade secrets. A confidentiality agreement should protect the employer’s product and limit disclosure by the employee but not take away the employee’s livelihood. The employer has an interest in protecting proprietary information, and the employee has an interest in protecting the employee’s source of income.

With the increase in whistleblowing, as well as in employee confidentiality agreements, the enforceability of confidentiality agreements may be questioned more frequently. An employee subject to a confidentiality agreement may claim that enforcement of the agreement will adversely affect the health or safety of third parties or conceal illegality; the employee may claim the employer has bought the employee’s silence through a confidentiality agreement to avoid costly correction of wrongdoing. A gray area is where concealment of a potentially defective or harmful product allows a company to continue manufacturing it without eliminating the defect and profiting from the defective product. Challenges to confidentiality agreements are difficult cases to decide. Where an employee claims a design defect presenting a substantial health or safety risk, the employer may argue there is no substantial risk to health or safety and the claimed “defect” is inextricably related to

\begin{itemize}
\item \textsuperscript{467} See id.
\item \textsuperscript{468} See \textit{Campbell Soup}, 171 F.2d at 83.
\item \textsuperscript{469} See id.
\end{itemize}
Examples of a concealed product defect or illegality which caused great harm to the public include the Challenger explosion, the Pinto rear-end collisions, the Love Canal contamination, and the Three Mile Island nuclear disaster. Design problems on the Challenger presented an imminent danger to crew members even though there may have been no statutory violation. Similarly, plaintiffs in Pinto lawsuits contended that design problems with the Pinto presented an imminent danger to passengers. The Love Canal and Three Mile Island incidents threatened health and safety, while presumably violating civil and, possibly, criminal statutes.

Early whistleblowing in each of those incidents could have avoided serious danger and considerable harm to product users, bystanders, and the general public. The significant public health and safety risks and statutory violations of those incidents signal organizational failure. In each incident, it was less costly, at least in the short run, to stifle whistleblowing. Use of confidentiality agreements in an analogous situation may conceal a practice contrary to public policy. If the practice is basic to the industry's viability or profit, the agreements are likely to be enforced to the letter by litigation.

Other potential Challengers, Pintos, Love Canals, or Three Mile Islands might be avoided by a public policy exception to confidentiality agreements for whistleblowing. Logic begs that disclosure of the same type of information protected by the whistleblowing public policy exception to the employment at will doctrine be allowed, even in the face of a confidentiality agreement. The movement emphasizing fairness in contracts, in the development of the public policy exception to employment at will, and the promulgation of whistleblowing statutes has left confidentiality agreements behind. Confidentiality agreements overlay the important relationship of the individual to the institution and the relationship of the institution to the social order.

470. See W. David Slawson, Binding Promises: The Late 20th Century Reformation of Contract Law 44 (1996). W. David Slawson's research shows that in the 1960s courts in insurance cases began to use "reasonable expectations" in interpreting insurance policies. See id. A court using reasonable expectations would enforce the reasonable expectations of the parties rather than contrary contract language. See id. Slawson describes a trend in courts enforcing the reasonable expectations of the consumer even in the face of contrary language in a contract. See id. at 44-73.
as a whole. The employer profits to the detriment of society if a confidentiality agreement is used as a shield to protect employer's illegal acts or defective products. These relationships are the same ones involved in the public policy exception to the employment at will doctrine.

Society encourages concern for others. Employees should be protected, if as a civic act, they disclose wrongful acts of the employer; otherwise, the employer may exploit the employee's duty of loyalty. The benefit of disclosure must be weighed against the employer's loss of protection for trade secrets and proprietary information. The employer has superior bargaining power because of superior knowledge of its products and the fact that the employee needs the income. The employer can easily use this superior bargaining power when it drafts confidentiality agreements; the employer may attempt to fashion or to enforce an overly broad confidentiality agreement to use as a shield to protect its illegal acts or defective products.

What should be the contours of a whistleblowing public policy exception to confidentiality agreements? An exception must start with the premise that a confidentiality agreement is enforceable. Few employers require employees to execute confidentiality agreements for the purpose of covering up illegality, acts contrary to statute, or acts otherwise contrary to public policy. Most potential problems with confidentiality agreements arise in the course of their execution.

An exception can prevent injury to society and to third parties or can be used to collect necessary information on criminal or tortious activities or activities in violation of a statute. An exception can prevent danger to health and safety, prevent illegal or criminal conduct, and promote compliance with statutes.

A confidentiality agreement may be unenforceable if the agreement in substance or as applied adversely affects public policy by precluding whistleblowing which would have disclosed injury to third parties or to society. It is contrary to public policy and injures society to suppress information posing a substantial and imminent health or safety danger to third parties. Keeping information of illegality or statutory violation secret injures society. An affirmative promise not to disclose information on illegal acts leads to non-compliance with the criminal justice system. An affirmative promise not to disclose information violating statutes thwarts the purpose of the statutes. Public policy should be based on
fundamental public values, whether reflected in legislation or not, where whistleblowing would prevent unnecessary substantial, irreversible harm or danger to others. The court should also explore the employer's reasons for enforcing the confidentiality agreement. Public policy should allow disclosure if the employer has no overriding legitimate business justification, recognizing that the purpose of the confidentiality agreement is to avoid unfair competition.

The cases in the third and fourth sections of Part II lack any in-depth analysis and fail to develop any theory that a court might use to determine whether a non-disclosure provision may be set aside. However, the cases do have several things in common. They all concern communication of information; the information concerns an illegality, a tort, or a violation of positive law and most are in the employment context. Disclosure of the information was generally allowed where it prevented danger to health and safety, prevented illegal or criminal conduct, and promoted compliance with statutes. A number of journal articles implicitly recognize that a non-disclosure provision should be set aside in certain circumstances but fail to offer any guidance to determine the circumstances for invalidating a non-disclosure provision. The balance of this section will attempt to develop such a theory. A starting point is the *Restatement (Second) of Agency* and the *Restatement (Second) of Contracts.*

The *Restatement (Second) of Agency* recognizes that at times the interest of the employer in safeguarding confidential information may have to yield to an interest of the employee. Section 418 provides, "An agent is privileged to protect interests of his own which are superior to those of the principal, even though he does so at the expense of the principal's interest or in disobedience to his orders." Comment a to this section of the *Restatement* gives examples of interests which might outweigh the employee's duty of confidentiality. The comment provides, "[T]he agent has no

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471. *See supra* notes 94-240 and accompanying text.
472. *See id.*
473. *See id.*
474. *See id.*
475. *See id.*
476. *See supra* notes 86-91 and accompanying text.
478. *Id.*
479. *See id.* cmt. a.
duty to commit a tort or a minor crime at the command of the principal. A contract requiring him to do so is illegal . . . .”

Similarly, the employee’s duty to obey the employer may yield to an interest of the employee or to the interest of a third party. Comment a to subsection (1) notes, “In no event would it be implied that an agent has a duty to perform acts which, although otherwise within the scope of his duties, are illegal or unethical.” Comment d to subsection (2) notes that the employee “is under a duty not to act contrary to what the principal directs, unless he is acting in the protection of an interest which he is privileged to protect.”

The Restatement (Second) of Contracts states that a contract term may be unenforceable as contrary to public policy. A court could declare a contract term unenforceable if, after balancing the interests of the employer, the employee, and society, public policy outweighs the employer’s interest in enforcing the term. Subsections (2) and (3) of section 178 of the Restatement (Second) of Contracts illustrate the process a court would go through to determine whether a confidentiality agreement is unenforceable. In reviewing the interest in enforcing the challenged term, the court would have to consider:

(a) the parties’ justified expectations,
(b) any forfeiture that would result if enforcement were denied, and
(c) any special public interest in the enforcement of the particular term.

480. Id.
481. Restatement (Second) of Agency § 385 (1958). It provides, “Unless he is privileged to protect his own or another’s interests, an agent is subject to a duty not to act in matters entrusted to him on account of the principal contrary to the directions of the principal . . . .” Id. § 385(2) (emphasis added).
482. Id. § 385(1) cmt. a.
483. Id. § 385(2) cmt. d.
484. See Restatement (Second) of Contracts § 178 (1981). Section 208 of the Restatement describes the remedies that a court might adopt after finding a contract term unconscionable. See id. § 208. A court might enforce all but the unconscionable contract term, might limit the enforcement of the term to avoid an unconscionable result, or might declare the entire contract unenforceable. See id.
485. See id. § 178(2) & (3).
486. See id.
487. Id. § 178(2).
The court would also review the interest in not enforcing the challenged term to determine:

(a) the strength of that policy as manifested by legislation or judicial decisions,
(b) the likelihood that a refusal to enforce the term will further that policy,
(c) the seriousness of any misconduct involved and the extent to which it was deliberate, and
(d) the directness of the connection between that misconduct and the term.488

Section 178 (3)(a), which seems to base public policy exclusively on “legislation or judicial decisions,” is further explained by section 179.489 Section 179 of the Restatement (Second) of Contracts states that public policy may be determined by reference to “legislation relevant to such policy” or “the need to protect some aspect of the public welfare.”490

Under basic contract law, a contract is unenforceable if contrary to public policy.491 Confidentiality agreements are no

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488. Id. One of the most widely used formulations of the public policy exception to the employment at will doctrine contains four elements:

1. That a clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the clarity element).
2. That dismissing employees under the circumstances like those involved in the plaintiff’s dismissal would jeopardize the public policy (the jeopardy element).
3. The plaintiff’s dismissal was motivated by conduct related to the public policy (the causation element).
4. The employer lacked overriding legitimate business justification for the dismissal (the overriding justification element).


Perritt’s four-part test contains some interesting similarities to the Restatement (Second) of Contracts seven-part test. The concerns in both are identifying the contours of public policy so that it is neither overinclusive nor underinclusive, determining what detrimental effect enforcement would have on public policy, and whether, once public policy have been found, there is a countervailing and superior reason for enforcement.

490. Id.
491. See id. § 178.
different than other contracts in that they may be held to be unenforceable as contrary to public policy. The difficulty is in determining public policy. Just because public policy is difficult to determine does not mean that the quest must be abandoned.

As discussed in the previous section of this part, "public policy" is difficult to define; determining public policy is similarly difficult to determine in the at will employment context. Defining the public policy exception to employment at will is "tricky." Any definition of the term is inherently "uncertain," "imprecise," "vague," "amorphous," it may be virtually undefinable. One commentator stated, "Determining what is to be regarded as public policy is undoubtedly the Achilles heel of the public policy exception." Another commentator stated, "There is no precise definition of the term." Generally, courts distinguish between employee whistleblowing in the public interest, which is protected, and employee whistleblowing to satisfy some private interest, which does not fall within the exception. A court stated, "[P]ublic policy concerns what is right and just and what affects the citizens of the State collectively. . . . [A] matter must strike at the heart of a citizen's social rights, duties, and responsibilities before the tort will be allowed." But because the public/private distinction is elusive, whether a court will find the existence of the public policy exception is "unpredictable." The same difficulty inheres in determining the source of public policy:

The cause of action is allowed where the public policy is clear, but is denied where it is equally clear that only private interests are at stake. Where the nature of the interest at stake is muddled, the courts have given conflicting answers as to whether the protection of the tort action is available.

492. See supra notes 460-75.
493. See id.
494. See Pennington, supra note 272, at 1593.
495. Id. at 1594 n.62.
496. Fahleson, supra note 276, at 967.
497. Id.
498. Schwab, supra note 280, at 1957 (citing Palmateer v. International Harvester, 421 N.E.2d 876, 878 (Ill. 1981)).
499. See id.
500. Palmateer, 421 N.E.2d at 878-79.
Because public policy is so hard to determine, the state-created public policy exceptions to employment at will serve as another starting point. The public policy exception to the employment at will doctrine balances the interests of society, the employer and the employee. This exception is especially appropriate to examine because the cases illustrate the situations within the employment context in which society's (and the employee's) interest outweighs the interest of the employer. After all, if a former employee is able to sue and collect damages for termination in violation of public policy, an employee who disclosed the same information and is sued by the employer for violating a confidentiality agreement, should be able to use public policy as a defense.

A state might determine if a confidentiality agreement is unenforceable because of public policy first by looking at the state's public policy exception to employment at will. If the whistleblowing would have been sufficient to be an exception to the state's employment at will doctrine, then the same whistleblowing should be sufficient to hold a confidentiality agreement unenforceable. Each state should recognize a defense to a breach of confidentiality agreement claim as broad as that allowed under the public policy exception to employment at will. Strict reliance on positive law may be underinclusive where positive law does not govern a substantial health or safety danger. Although synonymous with public policy, a court may be reluctant to allow an exception to prevent danger to health or safety without a basis in positive law. In disclosure of health or safety threats, where should the line be drawn?

Health and safety threats should certainly be disclosed where the danger is substantial and imminent. Because of the importance of health and safety, perhaps disclosure should be allowed where the danger is not quite so substantial or so imminent. In Green v. Ralee Engineering Co., a 1997 California case, an employee aircraft inspector complained to the employer that the employer was shipping defective parts for passenger aircraft and altering inspection records. In reversing the summary judgment for the employer, the court stated:

503. 61 Cal. Rptr. 2d 352 (Ct. App. 1997).
504. See id. at 356.
In the hierarchy of public policies, safety from physical harm and death ranks at or near the top. And, in the hierarchy of public safety concerns, safe air travel ranks at or near the top, in large measure because of the vulnerability of air travelers and the almost certain death that awaits them if there is a crash.\footnote{505}

This same vulnerability was not recognized by a West Virginia court.\footnote{506} In the West Virginia case, an airline employee reported an alleged safety violation of a pilot to management.\footnote{507} The court held that state public policy does not support a wrongful discharge claim for a violation of federal aviation law.\footnote{508} Another example of a potentially serious threat to health and safety was presented in a 1974 Pennsylvania case, \textit{Geary v. United States Steel Corp.}\footnote{509} In \textit{Geary}, a salesman of tubular products to the oil and gas industry, was fired after he reported to his supervisor and a company vice president that he believed that a particular type of tubular casing was not adequately tested and was dangerous.\footnote{510} After Geary notified his employer, the product was withdrawn from sale.\footnote{511} The Pennsylvania Supreme Court affirmed the dismissal of Geary’s complaint because no clear mandate of public policy was involved.\footnote{512}

In a recent article, Stewart Schwab suggests an alternative to the current practice of a number of courts of analyzing whether the public policy exception to employment at will should apply by searching for a violation of positive law.\footnote{513} He suggests that a court analyze third-party effects rather than limit the public policy exception to violation of positive law; thus, a court should refuse to enforce a contract with “substantial adverse third-party effects.”\footnote{514}

If one were to reanalyze wrongful discharge cases to determine

\begin{itemize}
  \item \textbf{505.} \textit{Id.} In \textit{Green}, the court noted that “the public interest in the proper manufacture and inspection of aircraft components is so important and so evident in federal statutory and regulatory law that it satisfies the public interest exception protecting at will employees from retaliatory discharge” \textit{Id.}
  \item \textbf{506.} \textit{See Tittle v. Crown Airways, Inc.,} 928 F.2d 81, 82 (4th Cir. 1990).
  \item \textbf{507.} \textit{See id.}
  \item \textbf{508.} \textit{See id.}
  \item \textbf{509.} 319 A.2d 174 (Pa. 1974).
  \item \textbf{510.} \textit{See id. at 175.}
  \item \textbf{511.} \textit{See id.}
  \item \textbf{512.} \textit{See id. at 175, 180.}
  \item \textbf{513.} \textit{See Schwab, supra} note 280, at 1945, 1952.
  \item \textbf{514.} \textit{Id.}
\end{itemize}
the effect of the employee whistleblowing on third parties, one would see that the public policy exception is generally applied where the effect on persons outside the employer-employee relationship is substantial and adverse.\footnote{515} For example, in Green, the aircraft inspector did have a cause of action for reporting the shipment of defective parts for passenger aircraft where the practice violated Federal Aviation authority regulations.\footnote{516} However, other courts have not found that the public policy exception should apply even where silencing the employee is very likely to have a substantial adverse effect on third parties.\footnote{517} For example, in Geary, a discharged employee’s lawsuit was dismissed because it had no basis in positive law.\footnote{518} Green and Geary were similar in that whistleblowing disclosed a substantial adverse threat to the health and safety of third parties.\footnote{519} The alleged defects in company products were hidden, making air travelers and oil and gas workers vulnerable to death or serious injury.\footnote{520} In determining whether whistleblowing should be protected, courts might better analyze whether the effect of the whistleblowing on third parties is substantial and adverse. That analysis should be substituted for a search for a public policy basis in positive law.

In advocating a public policy exception to confidentiality agreements, this author is writing on a clean slate, although against the backdrop of prior decisions concerning whistleblowing and the public policy exception to employment at will. The author suggests balancing the employer’s interest in safeguarding information against the employee’s and society’s interests in disclosure by using the following six-part test.\footnote{521} A court could hold

\begin{itemize}
\item \footnote{515} See supra notes 321-41 and accompanying text.
\item \footnote{516} See supra notes 503-05 and accompanying text.
\item \footnote{517} See supra notes 369-70 and accompanying text.
\item \footnote{518} See supra notes 509-12.
\item \footnote{519} See supra notes 503-12.
\item \footnote{520} See id.
\item \footnote{521} Although not a formal part of the six part test, an underlying assumption is that the employee is whistleblowing in good faith after investigating the whistleblowing claims. The employee must produce proof sufficient to persuade a reasonable person that the employee’s facts are accurate. The proof required should be sufficient to avoid unfounded claims. The employee must report the alleged wrongdoing in good faith after having undertaken a reasonable investigation. “Good faith” should go to the sufficiency of facts to avoid unfounded claims but should not negate an employee reporting with mixed motivation. What is important is the potential harm to society avoided by the disclosure rather than any employee hostility to the employer; the avoidance of substantial harm to third parties is identical whether the employee is reporting
\end{itemize}
a confidentiality agreement unenforceable if public policy outweighs the employer's interest. The inquiry is whether the employer's protection of a trade secret or confidential information should be safeguarded in the face of some public policy concern. Another factor is whether an employee can disclose necessary information without adversely affecting the employer's trade secrets and confidential information. Borrowing from Schwab, the existence of public policy should be measured by whether non-disclosure would have substantial adverse third-party effects. To determine whether a challenged confidentiality agreement should be enforced, a court would examine:

1. what information the parties reasonably expected to be protected under the confidentiality agreement (reasonable expectations);
2. any loss to the employer that would result if enforcement were denied (loss to employer);
3. the extent to which the information is protectable as a trade secret or proprietary information (protectability);
4. any substantial adverse effect enforcement of the term would have on third parties (substantial adverse effect on third parties);
5. the likelihood that a refusal to enforce the term will contribute to the effect (exacerbation of adverse effect); and
6. whether limited disclosure would guard against the effect while still protecting employer's information (limited disclosure).

wholly out of employer loyalty or with a combination of a desire to right a wrong and get even with the employer. Unfounded claims may include those protesting an internal management decision rather than immoral or illegal conduct and those based on inaccurate facts made without sufficient investigation. The employee should also attempt to blow the whistle internally before blowing the whistle externally unless the employee has good reason to believe that internal whistleblowing would be futile.

522. See Schwab, supra note 280, at 1945.
C. Application of the Test

The first element, reasonable expectations, examines what information is protected. The employer and employee could have reasonably thought a confidentiality agreement would protect the employer's trade secrets and proprietary information, but not employee's general knowledge or skills; the confidentiality agreement could not reasonably be expected to safeguard information concerning illegal acts. For example, the confidentiality agreements Wigand allegedly breached were broad ones, claimed by B&W to cover virtually everything Wigand knew about B&W. Wigand disclosed that B&W knew that use of its products presented substantial health risks and that Sandefur, B&W's chief executive officer, had admitted privately that nicotine is addictive. The B&W confidentiality agreements appear to have been overly broad, safeguarding more than B & W trade secrets and proprietary information. Under basic contract principles, the parties could not have reasonably expected the agreements to prohibit disclosure of Sandefur's alleged perjury.

Disclosure could result in significant loss to the employer. Losses might include lost profit due to loss of goodwill or to withdrawal of a previously profitable product from the market. Disclosure may lead to an increase in lawsuits against the employer, increased legal fees for defending lawsuits, and an increased number of monetary judgments against the employer. The legal landscape for B&W has been completely transformed in the last few years. B&W, along with the other big tobacco companies, has gone from being virtually judgment proof, to paying out settlements in Mississippi, Florida, and Minnesota. B&W faces the real potential of a multi-state settlement and regulation by the FDA. B&W is the defendant in a number of class action lawsuits. One asbestos company, allegedly forced to pay for injury partially

523. See supra notes 400-01 and accompanying text.
524. See supra note 403.
525. See id.
526. See supra notes 13-27 and accompanying text.
527. See supra notes 22-27 and accompanying text.
due to tobacco, has sued the tobacco industry for reimbursement; other similar lawsuits seeking contribution from the tobacco industry may follow. Presumably, the increase in B&W's legal fees since Wigand's disclosures has been exponential.

The third element examines whether the information the employee seeks to disclose is of the type generally protected as a trade secret or as proprietary information. Wigand, because of his position as a top B&W scientist, has information which certainly concerns B&W trade secrets. Other information, such as the addictiveness of cigarettes, was not the type of information protectable as a trade secret and was public.

The fourth element analyzes whether nondisclosure would result in serious danger to the health or safety of others or allow illegal acts to go unpunished. How imminent and substantial is the danger? It is better to avoid all potential health and safety problems but some may not be obvious until health and safety have already been impacted. For example, it was hard to predict the danger prior to the Challenger explosion and prior to the first Pinto crash. For Wigand and B&W, this is a gray area. The tobacco industry foes claim that the link between tobacco and cancer and other health problems is clear, additives to tobacco products increased the risk, and the tobacco industry manipulated nicotine levels to keep smokers addicted. The tobacco industry claims that there is no clear link between tobacco and health problems, smokers choose to smoke, and smokers should have individual responsibility for their actions. A confidentiality agreement which fails to meet the public policy exception outlined above because the effect on third parties is not "substantial" and "adverse" could still be held unenforceable as unconscionable.

531. See supra notes 403-06 and accompanying text.
532. See id.
533. See id.
534. See Quraishi, supra note 438, at 187-89. Quraishi compared western common law and Islamic legal principles. See id. Then, he formulated a two-prong test for determining whether a contract is unconscionable. See id. at 189. Quraishi first noted the need for a workable test to determine if a contract is unconscionable. See id. He then reviewed relevant common law and Islamic principles before fashioning a two-prong test. See id. at 191-214. The first prong of the test, unjust enrichment, borrows from Islamic law and the second, an
The "exacerbation of adverse effects" element reviews whether the information was already publicly available. A number of sources claim that Wigand's disclosures significantly hastened the increased liability of the tobacco industry, because of the quality of the information revealed, the credibility of such a high former tobacco official speaking, and the encouragement this gave to others to disclose. On the other hand, much of the information was already publicly available and increased liability of the tobacco industry was inevitable, given the increasingly anti-tobacco mood in the country and the move toward political correctness.

A solution to the conflict between the employer's insistence on enforcing a confidentiality agreement and the employee's desire to make certain information public would be for the court to allow limited disclosure of information impacting on public policy without disclosing trade secrets or proprietary information. If Wigand's disclosures had only been made in the context of lawsuits, the court may have been able to fashion some remedy allowing partial disclosure. Partial disclosure may have allowed disclosure of vital information while protecting trade secrets. The cases discussed in the "federal cases" section of Part II of this article seem to say that the integrity of the judicial system requires

535. See supra notes 6-9 and 371 and accompanying text.
536. See supra note 376 and accompanying text.
communication of vital information, even in the face of a confidentiality or settlement agreement.

The six elements of the test could be applied to Wigand's allegations. Wigand should have been allowed to disclose information on Sandefur's alleged perjury. Disclosure is an easy conclusion to reach because the parties could not have reasonably expected the confidentiality agreements to protect information concerning a criminal act; in addition, the information was not protectable as a trade secret. Wigand's other disclosures were that tobacco causes cancer and other health problems,\textsuperscript{537} that the company used strategies to keep the information private, that the tobacco company manipulates nicotine levels,\textsuperscript{538} and that the additives to the company's products present health dangers.\textsuperscript{539} The first two disclosures should have been allowed because the information was not protectable as a trade secret; the first disclosure also has a substantial adverse effect on third parties. Whether the last two disclosures should be allowed is a more difficult question because disclosure may result in the loss of trade secrets and loss to the employer; however, the adverse effect on third parties is substantial and non-disclosure would exacerbate the adverse effect. Also, disclosure could be limited to avoid disclosure of trade secrets.

V. CONCLUSION

In the employment relationship, the employee has a common law duty to safeguard the employer's confidential information. A growing number of employers wisely require employees to sign confidentiality agreements; the agreements can define the information the employer claims as confidential and can make the employee aware of the duty of non-disclosure. Confidentiality agreements are generally enforceable to protect the employer's trade secrets and proprietary information. However, the duty of non-disclosure is not absolute, especially if the employer is attempting to prevent the employee from revealing illegality or substantial adverse effects on third parties.

This article proposes a public policy exception to the enforceability of confidentiality agreements. A court would

\textsuperscript{537} See supra notes 403-06.
\textsuperscript{538} See id.
\textsuperscript{539} See id.
determine whether a challenged confidentiality agreement should be enforced by applying the six-part test. The six-part test would require a court to consider the parties’ reasonable expectations, the potential loss to the employer if the confidentiality agreement is not enforced, the protectability of the information as a trade secret or proprietary information, substantial adverse effects on third parties, exacerbation of the adverse effects if the confidentiality agreement is enforced, and the possibility of limited disclosure.