COMMENT

AN EMPLOYER'S RELATIONSHIP WITH ITS RECRUITING FIRM—SOMETHING MORE THAN AN ARM'S-LENGTH TRANSACTION

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I. INTRODUCTION

Demand for top talent in the global economy is at an all-time high.[1] The need for qualified workers continues to exceed the supply of skilled labor[2] despite rising unemployment figures and rippling economic recessions across the globe.[3] To combat the talent shortage, employers invest heavily to secure and retain the right team[4] to accomplish their business objectives.[5] Part of this investment often includes expending substantial resources on placement agencies[6] that promise to deliver top talent.[7]

1. *See* HAYS RECRUITING EXPERTS WORLDWIDE, THE HAYS GLOBAL SKILLS INDEX 2013, at 6 (2013), *available at* http://www.hays-index.com/archive/ (reporting tightened labor markets in most countries around the world, with eighteen countries experiencing skill shortages). *See generally* PRICEWATERHOUSECOOPERS, DELIVERING RESULTS THROUGH TALENT: THE HR CHALLENGE IN A VOLATILE WORLD (2012), *available at* http://www.businessandleadership.com/download/fs/doc/reports/pwc-delivering-results-through-talent.pdf (relating findings from 1,258 interviews with CEOs from 60 different countries regarding the global talent crisis).

2. *See* HAYS RECRUITING EXPERTS WORLDWIDE, *supra* note 1, at 9 (highlighting divergent character of skill shortages in economies with rapid growth and those facing significant difficulties); *see also* PRICEWATERHOUSECOOPERS, *supra* note 1, at 5 (pointing to a lack of skilled labor as a key threat to corporate profitability around the world).

3. *See* Valentina Pasquali & Tina Aridas, *Unemployment Rates in Countries Around the World*, GLOBAL FIN. MAG. (Mar. 13, 2013), http://www.gfmag.com/component/content/article/119-economic-data/12384-worlds-unemployment-ratescom.html#axzz2iaK5EbPa (linking staggering worldwide unemployment figures with the global economic crisis). *See generally* E. Ericka Kelsaw, *Help Wanted: 23.5 Million Unemployed Americans Need Not Apply*, 34 BERKELEY J. EMP. & LAB. L. 1 (2013) (analyzing the implications of rampant unemployment in the United States).

4. *See* Michael Lindsay & Katherine Santon, *No Poaching Allowed: Antitrust Issues in Labor Markets*, ANTITRUST, Summer 2012, at 73, 73 (characterizing employer–employee relationship as a "joint investment" where employer contributes substantially through training programs and compensation package and employee provides valuable time and effort); *see also* Greg T. Lembrich, Note, *Garden Leave: A Possible Solution to the Uncertain Enforceability of Restrictive Employment Covenants*, 102 COLUM. L. REV. 2291, 2296 (2002) (pointing to the large costs associated with both the acquisition and development of a workforce).

5. *See* Josh Bersin, *Corporate Recruiting Explodes: A New Breed of Service Providers*, FORBES (May 23, 2013, 8:18 AM), http://www.forbes.com/sites/joshbersin/2013/05/23/corporate-recruitment-transformed-new-breed-of-service-providers/ (tying successful recruiting initiatives to corporate performance, employee retention, and customer service).

6. *See id.* (reporting that U.S. corporations spend almost $72 billion per year on recruiting services).

7. At their foundation, recruiting firms' marketing strategies all return to the same central premise: a *unique*, *superior* ability to find the best candidates for clients' positions. Even a small sampling of recruiting firms' marketing slogans—as represented on their websites—demonstrates the prevalence of this perspective. *See* ALLEGIANCE STAFFING, http://www.allegiancestaffing.com (last visited Dec. 24, 2014) ("Had enough with so-so staffing services? Tired of wasting your time and money? You need a true staffing partner . . . . Allegiance is that partner."); CORNERSTONE STAFFING, http://www.cornerstonestaffing.com/dallas-fort-worth-staffing-agencies/ (last visited Dec. 24, 2014) ("Unmatched Staffing Services."); DELTA STAFFING, http://www.delta-staffing.com/index.html (last visited Dec. 24, 2014) ("Delta Is Different."); LUCAS GRP.,

Taking advantage of the perfect storm created by an increased demand for professional services and a shortage of qualified candidates, recruiting firms of all shapes and sizes search for permanent employees on behalf of employers across the nation.[8] These searches are often characterized by non-exclusive contingency agreements wherein a recruiting firm's entitlement to remuneration is directly tied to successful placement.[9] Fees for a permanent placement typically range from 15% to 30% of a candidate's first year salary, depending on the search, the firm, the need, and the state of the economy at the time.[10]

Known as much for their tenacity as their skill, recruiters leverage a unique persona—best described as a blend of affable salesperson, technology expert, and cunning business developer[11]—to find top talent for permanent placement with eager clients. Sources of potential candidates include leads generated through targeted networking, referrals from satisfied customers, responses to job posts, résumé databanks,[12] and

http://www.lucasgroup.com/executive-recruiting/recruitment-process/ (follow "Identification" hyperlink) (last visited Dec. 24, 2014) (asserting the ability to locate talent "no one else can").

8. *See* Bersin, *supra* note 5 (noting the correlative relationship between the improving economy and the explosive increase in demand for recruiting services and consultants); *see also* Katherine Van Wezel Stone, *Employment Protection for Atypical Workers: Proceedings of the 2006 Annual Meeting, Association of American Law Schools Section on Labor Relations and Employment Law*, 10 EMP. RTS. & EMP. POL'Y J. 233, 234 (2006) (indicating executive search firms, staffing firms, and fee-charging employment agencies are prominent components of the modern labor landscape).

9. *See* Randi V. Morrison, *Integrating Recruiters into Your Job Search & Professional Network*, CORP. GOVERNANCE ADVISOR, Jan.–Feb. 2013, at 17, 17 (discussing the nature of recruiting firms' services for employers and candidates).

10. *See* BAY AREA RECRUITERS, INC., http://barecruiters.com/cost_page.htm (last visited Dec. 24, 2014) (noting contingency fees are usually 25% or 30%); BOUNTYJOBS, THE BOUNTYJOBS HEADHUNTER INDEX 3 (2011), *available at* http://www.bountyjobs.com/information/news/BountyJobs-Headhunter-Index.pdf (reporting average headhunter fee as 19.72% of candidate's first year salary); Kris Dunn, *How Much Should You Pay When It Comes to Contingency Recruiting Fees?*, HR CAPITALIST (Dec. 30, 2009), http://www.hrcapitalist.com/2009/12/how-much-should-you-pay-when-it-comes-to-contingency-recruiting-fees.html (commenting on willingness of recruiters to negotiate fees down from 30% to 15% of a candidate's salary); MADISON GRP., FEE AGREEMENT, *available at* http://www.madison-inc.net/pdf/MadisonGroup_FeeAgreement.pdf (commanding 25% fee for placement); Rebecca B. Sargeant, *Are You a Fee Worthy Recruiter?*, RECRUITING BLOGS (June 11, 2012, 9:18 AM), http://www.recruitingblogs.com/profiles/blogs/are-you-a-fee-worthy-recruiter (classifying great recruiters as worthy of fees from 20% to 30% of a candidate's salary).

11. *See* Bersin, *supra* note 5 (characterizing recruiters as technology, sales, and social media experts); *see also Characteristics of Top Recruiters*, CAREERBUILDER, http://www.careerbuilder.com/jobposter/staffing-recruiting/article.aspx?articleid=ATR_0046HIRINGRECRUITERS (last visited Dec. 24, 2014) (including "Business-oriented thinking, Salesmanship, People skills, Long-term relationship building, Tech know-how, [and] Negotiation" in a list of talents common to the best recruiters).

12. *See, e.g.*, CAREERBUILDER FOR EMPLOYERS, http://www.careerbuilderforemployers.com/ (last visited Dec. 24, 2014) (offering the option to post job openings and search résumés for a fee).

passive candidates.[13]

Though affirmative communication from applicants interested in a firm's open positions arguably constitutes the easiest path to placement, passive candidates are quickly becoming the primary target of zealous recruiters.[14] Passive candidates are those currently employed but open to the possibility of changing positions if presented with the right opportunity.[15] These candidates are akin to the holy grail[16] of the recruiting world for two primary reasons. First, passive candidates carry the potential of exclusivity in an industry where the first firm to submit a candidate is entitled to any potential fee.[17] The likelihood of a passive candidate sharing his or her résumé with multiple recruiters is small, given the candidate's need to balance exploring career options with maintaining current employment.[18] Recruiters zealously target those professionals

13. *See* Sasqua Grp., Inc. v. Courtney, No. CV 10-528, 2010 WL 3613855, at *9 (E.D.N.Y. Aug. 2, 2010) (providing insight into recruiters' sourcing tactics).

14. *See* Complaint for Damages and Injunctive Relief at 10, TEKsystems, Inc. v. Hammernik, No. 10-CV-00819 (D. Minn. Mar. 16, 2010), 2010 WL 1624258, ¶ 37 (alleging that recruiter utilized LinkedIn to solicit plaintiff's employees)*; see also* Scott Brutocao, *Issue Spotting: The Multitude of Ways Social Media Impacts Employment Law and Litigation*, THE ADVOC., Fall 2012, at 8, 16 (discussing allegations in *TEKsystems, Inc. v. Hammernik*); Marisa Warren & Arnie Pedowitz, *Social Media, Trade Secrets, Duties of Loyalty, and Restrictive Covenants and Yes, the Sky Is Falling*, 29 HOFSTRA LAB. & EMP. L.J. 99, 107–12 (2011) (including text of the LinkedIn messages sent by the recruiter defendant in *TEKsystems, Inc. v. Hammernik*).

15. *See* John Flanigan, *Capturing & Captivating the Passive Job Seeker*, WORKFORCE MGMT., July 2008, at 1, 1 ("A passive job seeker is an individual who is employed and not actively looking for a new job opportunity. However, if an opportunity presents itself, a passive job seeker would accept a better offer."). *But see* Liz Ryan, *The Latest Corporate Mania: Snagging 'Passive' Job Candidates*, BUSINESSWEEK (May 1, 2013), http://www.businessweek.com/articles/2013-05-01/the-latest-corporate-mania-snagging-passive-job-candidates ("[T]hese job candidates could be considered passive only when they're viewed through an employer's self-centered lens. They aren't passive at all, of course; these folks are busy at their jobs, blissfully unaware of the existence of whatever corporation has them in its sights . . . .").

16. *Cf.* Ryan, *supra* note 15 ("We call them passive candidates, and we pursue them as if they were Moby Dick.").

17. *See* Mary Dolan & Assocs. v. San Benito Med. Assocs., No. C0-97-1075, 1998 WL 40575, at *3 (Minn. Ct. App. Feb. 3, 1998) (awarding referral fee to recruiting firm that first submitted physician's credentials for placement at a Texas medical clinic, despite the physician's subsequent referral by and ultimate placement through an alternate agency). *Compare* CB Legal Search, LLC v. Lewis Brisbois Bisgaard & Smith, LLP, 441 F. App'x 251, 253–54 (5th Cir. 2011) (per curiam) (holding that recruiting firm was entitled to fee because the recruiter's initial introduction was "procuring cause" of candidate's hiring), *with* West v. Richards, 298 S.W. 528, 529 (Tex. Comm'n App. 1927) (noting a "procuring cause" may be a "contributing or concurrent" cause rather than the sole cause).

18. *See* Rich Hein, *8 Tips for Job Hunting While You're Still Employed*, CIO (Feb. 12, 2013), http://www.cio.com/article/728647/8_Tips_for_Job_Hunting_While_You_re_Still_Employed (suggesting candidates exercise discretion when alerting others about job search as not to jeopardize current employment).

whose skills align with a particular position's job description, regardless of whether said individual has expressed any interest in changing jobs,[19] so that they can submit a candidate no one else can claim.

In addition to exclusivity, employers prefer employed candidates.[20] Current employment conveys a particular message: one who is employed is steady, consistent, and attractive.[21] The idea is that a candidate who maintains his or her position while considering other options possesses the wisdom not to abandon gainful employment before solidifying a worthwhile alternative.[22] Passive candidates also carry a sort of transferred trust from their current employers—the fact that a corporation continues to employ a professional conveys the message that he or she is employable, and thus, less of a risk.[23]

What the recruiting industry terms "recruiting passive candidates,"[24] others classify as "employee poaching."[25] Those who laude the practice

19. Consider the success of social networking website LinkedIn. Though it began as the business professional's tame, bland alternative to Facebook, LinkedIn's total number of users, annual revenue, and global reach has skyrocketed in recent years. *See* Virginia Allen, *LinkedIn Contacts—Whose Property?*, CYBERSPACE LAW, Apr. 2013, at 7, 7–8 (reporting on LinkedIn's worldwide success, growing from 4,500 members in 2003 to over 200 million members as of Q4 of 2012). The success of LinkedIn is based primarily on the access it gives employers to passive candidates. *See* Sasqua Grp., Inc. v. Courtney, No. CV 10-528, 2010 WL 3613855, at *13–14 (E.D.N.Y. Aug. 2, 2010) (detailing defendant recruiter's testimony of her ability to use LinkedIn to locate the contact information, educational background, and professional profiles of employed individuals who met the criteria of a hypothetical search); *see also* Josh Bersin, *LinkedIn Is Disrupting the Corporate Recruiting Market*, FORBES (Feb. 12, 2012, 2:21 PM), http://www.forbes.com/sites/joshbersin/2012/02/12/linkedin-is-disrupting-the-corporate-recruiting-market/ (attesting to LinkedIn's change in vision from building a social network for professionals to creating "'the place' for professionals . . . [to] 'be found' by employers.").

20. *See, e.g.*, Kelsaw, *supra* note 3, at 4 (deducing that American truisms "it is easier to get a job when you already have one," and "the longer [you are] out of work, the harder it is to find work," reflect a deep-seeded history of preferential treatment for employed individuals).

21. *See In re* High-Tech Emp. Antitrust Litig., No. 11-CV-02509, 2013 WL 5770992, at *32 (N.D. Cal. Oct. 24, 2013) (discussing defendant employers' perception that passive candidates are "more qualified, diligent, and reliable"); *see also* Hein, *supra* note 18 (advising job seekers that hiring managers find currently employed candidates more attractive).

22. *Cf.* Flanigan, *supra* note 15, at 1 (contending the world's top professionals are currently employed).

23. *See* Kelsaw, *supra* note 3, at 35–39 (discussing psychological heuristics, "mental shortcut[s] that allow[] people to make decisions and judgments quickly and efficiently," in the context of hiring decisions and discrimination against the unemployed); *see also* Susan P. Shapiro, *Agency Theory*, 31 ANN. REV. SOC. 263, 265 (2005) (acknowledging the role of risk aversion in agency relationships).

24. *See* Jennifer Jolly Ryan, *Repairing Damaged Goods: Federal and State Legislation Prohibiting Employers from Making Current Employment a Job Requirement*, 14 RUTGERS RACE & L. REV. 54, 60 (2013) (noting employers and recruiters prefer "passive job-seekers who are already employed").

25. *See* Ray Mart, Inc. v. Stock Bldg. Supply of Tex., LP, 302 F. App'x 232, 235 (5th Cir. 2008) (per curiam) ("[P]oach [company's] employees."); *see also* Waterkeeper Alliance, Inc. v. Alan & Kristin Hudson Farm, 278 F.R.D. 136, 143 (D. Md. 2011) ("[A]ctively poach employees."); Atl. Grp. Ltd. v.

as smart business[26] conceptualize the activity as a recruitment strategy that softly offers employed candidates options they are free to accept, reject, or ignore altogether—all in the quest for putting the right people in the right places to do the best work.[27] In contrast, those injured by or seeking to defend against the loss of key personnel frame the activity with a less favorable connotation, labeling the practice "employee poaching"—equating the targeted recruitment and solicitation of employed candidates with an illegal hunting practice certainly approaches the concept from a different paradigm.[28]

This dichotomy in conceptualization represents the tension that provides a backdrop for this Comment. Determining how best to describe the act of recruiting employed candidates requires an analysis of the employer/recruiting firm relationship. The nature of this dynamic marks the boundary between the rights and duties of both parties and sets the stage for the remedies available when either party fails to fulfill its obligations. If simply commercial actors in a free-market society, the parties are free to pursue self-interests within the bounds of their contract and the law. However, if the relationship involves something more than an arm's-length transaction, drawing the line is not as simple.[29] This Comment explores the employer/recruiting firm relationship, examining

Interpublic Grp. of Cos., No. 00 Civ. 7845, 2005 WL 2277097, at *3 (S.D.N.Y. Sept. 15, 2005) ("[P]oach [plaintiff's] employees."); Allen, *supra* note 19, at 9 ("[P]oaching staff."); Lauren E. Moak, *Restrictive Covenants: An Employer's Best Friend*, DEL. EMP. L. LETTER, Mar. 2010, at 1, 1 ("[P]oaching employees.").

26. *See* Maureen Minehan, *The Pros and Cons of Poaching Competitors' Employees*, EMP. ALERT, Jan. 18, 2007, at 2, 2 (reporting human resource management professionals' and executive search consultants' portrayal of recruiting employed talent as an effective business solution).

27. *See In re* High-Tech Emp. Antitrust Litig., No. 11-CV-02509, 2013 WL 5770992, at *32 (N.D. Cal. Oct. 24, 2013) (finding plaintiffs supported allegations that high-tech companies, including Adobe, Google, Apple, and Pixar, view recruitment of "'passive candidates'—that is, employees who were not actively looking for a new job—as crucial to their growth and development"); *see also* Minehan, *supra* note 26, at 2 (advocating corporations use third parties to target competitors' employees).

28. One could argue that the difference in wording is simply semantics; yet, the precise language adopted to depict a particular phenomenon has profound implications. *See generally* Elizabeth Mertz, *Language, Law, and Social Meanings: Linguistic/Anthropological Contributions to the Study of Law*, 27 LAW & SOC'Y REV. 413, 413–14 (1992) (exploring various sociolinguistic and anthropological viewpoints on the impact of language choice on society's value judgments and the study of law).

29. Employee poaching seems to depict most accurately the phenomenon from the employer perspective, given the rise of litigation surrounding the recruitment of employed candidates. *See* T. Leigh Anenson, *Litigation Between Competitors with Mirror Restrictive Covenants: A Formula for Prosecution*, 10 STAN. J.L. BUS. & FIN. 1, 1 (2005) (noting increasing prevalence of lawsuits regarding the "cherry picking" of top employees in the modern business environment). The "employee poaching" characterization will be used throughout the remainder of this comment.

both the business dynamic and legal implications, and concludes that the special nature of the parties' relationship may impose heightened legal duties owed by recruiting firms to their employer-clients.

II. INCENTIVE ALIGNMENT AND MORAL HAZARD

With such large payouts on the line, the race to locate and recruit these employed candidates generates significant results and potential problems. Recruiting firms are highly incentivized to do whatever it takes to match candidates and clients. The nexus of this incentive lies in the contingent nature of a recruiter's fee and underscores the entire recruiting operational paradigm. Recruiters must place candidates in order to cover their direct costs, compensate for opportunity costs, and generate personal income.[30] Without successful placements, contingency recruiters do not generate revenue.[31] With successful placements, contingency recruiters possess the ability to garner significant financial gain.[32]

Agency theorists[33] herald this sort of outcome-based incentive as central to the achievement of the principal's objectives through its agent.[34] In the case of contingency recruiters, the client-company's use of a pay-for-performance model works to sync a recruiter's desire for income with

30. *Cf.* Kevin Wheeler, *4 Traits that Separate a Great Recruiter from a Good One*, ERE.NET (Mar. 22, 2011, 5:39 AM), http://www.ere.net/2011/03/22/4-traits-that-separate-a-great-recruiter-from-a-good-one/ ("The recruiting process . . . is about making good matches in a seamless and efficient way. Great recruiters figure out how to do this while appearing almost in the background.").

31. *See* Morrison, *supra* note 9, at 17–18 (explaining that contingency recruiting firms only receive payment only upon successful placement of a candidate).

32. *See generally* Jeremy Sisemore, *Earnings Potential—Recruiting Industry—Hot, Hot, Hot*, TOOLBOX.COM (Mar. 10, 2006), http://it.toolbox.com/blogs/it-recruiter/earnings-potential-recruiting-industry-hot-hot-hot-8148 (examining the prospect of earning significant income in the recruiting industry).

33. When viewed through the lens of economic theory, the existence of a principal–agent relationship between the recruiting firm and its client is clear: the client-employer serves as a principal, acting through its recruiting firm agent, toward the goal of finding top talent. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976) (offering classical definition of agency as "a contract under which one or more persons (the principal(s)) engage another person (the agent) to perform some service on their behalf which involves delegating some decision making authority to the agent"). *See generally* Kathleen M. Eisenhardt, *Agency Theory: An Assessment and Review*, 14 ACAD. MGMT. REV. 57 (1989) (surveying agency theory literature and foundational concepts).

34. *See* Robert Flannigan, *The Economics of Fiduciary Accountability*, 32 DEL. J. CORP. L. 393, 407 (2007) (pointing to principals' use of formal and informal incentives to square their interests to those of self-interested agents); *see also* Ulrike Leopold-Wildburger & Arleta Mietek, *Bonus or Flat Wage? An Experiment into the Principal–Agent Problem*, 217 APPLIED MATHEMATICS & COMPUTATION 1141, 1148 (2010) (explaining that outcome-oriented incentives drive agent behavior to a higher degree than a flat wage).

the company's need to hire qualified personnel.[35] In sum, passive candidates satisfy the needs of both the principal-employer and recruiter-agent: staffing professionals supply employers with the talent they desire and earn a hefty fee for their efforts—a near perfect alignment of competing objectives through outcome-based incentives.

Aligning these objectives is not without risk, however.[36] Recruiters acting in an agency relationship with client-companies operate in the realm of what agency theorists term "moral hazard."[37] Moral hazard represents the opportunity to exploit the limitations of an agency relationship—asymmetry of information[38] and imperfect monitoring and control mechanisms[39]—in order to maximize the agent's personal utility.[40] In the recruiting context, agency problems create a moral hazard for recruiters to channel their efforts and resources to whatever search and whichever client will generate the greatest return with the least amount of effort.[41]

35. *See* Morrison, *supra* note 9, at 17 (discussing the monetary incentive for contingency recruiting firms to place candidates).

36. *Compare* Robert H. Sitkoff, *The Economic Structure of Fiduciary Law*, 91 B.U. L. REV. 1039, 1042 (2011) (acknowledging that the goal of regulation in the agency relationship is the alignment of interests between the principal and agent in order to avoid loss and inefficiency), *and* Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045, 1046–47 (1991) (highlighting that the management of the principal and agent relationship includes risks and uncertainty), *with* Robyn A. Littman, *Lessons from the Procurement World: Understanding Why the Government Denies Its Employees Recovery After Infringing Their Copyrighted Works*, 39 PUB. CONT. L.J. 879, 886 (2010) (characterizing the relationship between risk allocation and moral hazard as a central trade-off in agency relationships).

37. *See* Eisenhardt, *supra* note 33, at 61 (referring to the contracting problem of moral hazard as an opportunity for an agent to "shirk," or put in less than his best level of effort toward accomplishing the principal's objectives).

38. *See* Littman, *supra* note 36, at 886 (pointing to key assumption in agency theory that the agent possesses more expertise and information than the principal).

39. *See* Flannigan, *supra* note 34, at 401, 407 (discussing economists' concerns with overcoming agency problems of asymmetry of information, cognitive and behavioral limitations, and infeasible monitoring capabilities); *see also* Littman, *supra* note 36, at 886 (summarizing that the role of monitoring in agency relationships is to remedy information asymmetry between the principal and its agent). *But see* Sitkoff, *supra* note 36, at 1041 (characterizing a principal's ability to monitor his agent's compliance with instructions as an infeasible endeavor that provides an unsatisfactory answer to the principal-agent problem).

40. *See* Littman, *supra* note 36, at 886 (explaining that moral hazard can lead to an agent's exploitation of the inherent informational inequality in agency relationships).

41. *See* Leopold-Wildburger & Mietek, *supra* note 34, at 1143 (contrasting an agent's desire to exude low levels of effort with the principal's dependence upon the agent's highest level of effort in order to receive maximum benefit); *see also* Flannigan, *supra* note 34, at 397 ("Principals normally prefer that their agents operate at or near the maximal level. Agents may prefer to operate near the minimal level. . . . [T]he equilibrium effort level will be determined by the commitment or enthusiasm of the agent as influenced by the incentives offered by the principal."). *See generally* Shapiro, *supra* note 23, at 263–84 (offering an in-depth yet practical consideration of agency theory and its application in various disciplines).

The need to maximize return on investment in terms of a recruiter's resources, time, and energy is both understandable and prudent; recruiting firms exist to generate profits by placing candidates looking for work with those companies needing the work done. Problems arise—and the term "hazard" becomes operative—when the most efficient allocation of a recruiter's resources carries with it layered ethical and legal considerations. One such consideration surfaces when recruiters target employed individuals from among the ranks of their clients.[42]

From an economic perspective, this result is to be expected because of the principal's vulnerability to an agent's opportunism.[43] Recruiters maintain contact with their clients' employees and possess detailed information about their hiring process, compensation package, and corporate culture.[44] From a positive perspective, this information allows recruiters to match a client's corporate culture to qualified candidates who will be a good fit for the organization. On the other hand, it also puts recruiters in the unique position of understanding what a new employer would need to offer in order to entice a client's employee to leave their position.

In sales, "knowledge is power."[45] Targeting one client's employees for placement with another client is easier and more efficient because the recruiter possesses substantial information about both sides of the equation. The temptation to take this easier route and maximize a recruiter's personal utility exemplifies the moral hazard in the employer/recruiting firm relationship and explains, from an agency theory

42. *See, e.g.*, Complaint for Damages and Injunctive Relief at 10, TEKsystems, Inc. v. Hammernik, No. 10-CV-00819 (D. Minn. Mar. 16, 2010), 2010 WL 1624258, ¶ 37 (accusing recruiter of recruiting plaintiff's employees for outside employment).

43. *See* Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 756 (1984) ("The agent has his own interests at heart, and is induced to pursue the principal's objectives only to the extent that the incentive structure imposed in their contract renders such behavior advantageous."); *see also* Sitkoff, *supra* note 36, at 1049 (highlighting agency theory's focus on agent "opportunism in circumstances of asymmetric information"). *But see* Gillian Lester, *Restrictive Covenants, Employee Training, and the Limits of Transaction-Cost Analysis*, 76 IND. L.J. 49, 49, 51–53 (2001) (critiquing the application of transaction-cost economic theory in law and economics literature wherein scholars suggest the purpose of legal rules, including those restraining postemployment competition, is to "mediate competing incentives for 'opportunism' by both firm and employee").

44. *See, e.g.*, Complaint for Damages and Injunctive Relief at 5, TEKsystems, Inc. v. Hammernik, No. 10-CV-00819 (D. Minn. Mar. 16, 2010), 2010 WL 1624258, ¶ 24 ("In her employment with TEKsystems, [the recruiter] Hammernik was involved in searches to identify qualified candidates for placement, developed familiarity with candidates, and oversaw the placement process.").

45. *See* Jeffrey Gitomer, *A Bad Day or a Bad Attitude?*, SALES CAFFEINE (Sept. 14, 2004), http://www.gitomer.com/salesMagazine/PrintableEzine.html?key=ajcdMibak3Muz9N5h6s4ew%3D%3D (admonishing sales professionals, "[Y]ou do understand that knowledge is power").

perspective, why a recruiter would use its own client as a candidate source.

III. EMPLOYER DAMAGES

The intersection of an employer's desire to hire top, often employed, talent and a recruiter's willingness to supply such talent in exchange for a significant fee satisfies the challenges of their relationship from an agency theory perspective.[46] Economists and academicians praise this sort of performance-based relationship management.[47] For employers on the receiving end, recruiting passive candidates is smart human resources practice.[48] For corporations that lose key employees, employee poaching can wreak significant damage.[49]

The recruitment of employed candidates causes employers to lose the significant investment poured into an employee over the course of his or her employment.[50] A valuable employee's departure exposes corporations to more than those direct costs associated with hiring, training, and onboarding a replacement.[51] The transfer of confidential corporate information to a competitor has the potential to cause catastrophic damage to a corporation;[52] a departing employee often takes trade secrets, client

46. *See* Eisenhardt, *supra* note 33, at 59–60 (examining the positivist agency theory propositions that principals can employ informational or performance-linked controls to reduce any harmful consequences of an agent's self-interest); Leopold-Wildburger & Mietek, *supra* note 34, at 1143 (providing reasoning behind the theoretical sustainment of equilibrium in the principal-agent conflict).

47. *See* Eisenhardt, *supra* note 33, at 59–60 (noting positivist agency theory's proposition that outcome-based contracts align an agent's interests with that of his principal).

48. *See, e.g.*, *In re* High-Tech Emp. Antitrust Litig., No. 11-CV-02509, 2013 WL 5770992, at *32 (N.D. Cal. Oct. 24, 2013) ("Defendants and other high tech companies value potential employees who are not actively looking for new employment opportunities ('passive candidates') more than those who are looking for new jobs ('active candidates').").

49. *See, e.g.*, Complaint for Damages and Injunctive Relief at 26–27, TEKsystems, Inc. v. Hammernik, No. 10-CV-00819 (D. Minn. Mar. 16, 2010), 2010 WL 1624258, ¶ 123 (arguing the recruiter's poaching of complainant's employees caused harm and irreparable damage to business complainant).

50. *See* Suzanne Lucas, *How Much Does It Cost Companies to Lose Employees?*, CBS MONEYWATCH (Nov. 21, 2012, 11:24 AM), http://www.cbsnews.com/news/how-much-does-it-cost-companies-to-lose-employees/ (reporting that the cost of replacing employees making under $50,000 per year is 20% of the employee's annual salary while the cost of replacing an executive can range up to 213% of the individual's annual salary); *see also* On Amir & Orly Lobel, *Driving Performance: A Growth Theory of Noncompete Law*, 16 STAN. TECH. L. REV. 833, 837, 869 (2013) (exploring the impact on corporations when a valuable employee leaves to join the ranks of a competitor).

51. *Turnover: Cost-of-Turnover Worksheet*, SOC'Y FOR HUMAN RES. MGMT (on file with the *St. Mary's Law Journal*) (including extensive "soft costs" in overall employee turnover cost calculation).

52. *See* Sasqua Grp., Inc. v. Courtney, No. CV 10-528, 2010 WL 3613855, at *5 (E.D.N.Y. Aug. 2, 2010) ("It is clear that irreparable harm is presumed where a trade secret has been misappropriated. In the words of the Second Circuit, '[a] trade secret once lost is, of course, lost forever' and, as a

connections, proprietary information, and relationships with other key employees directly to competitors, resulting in both immediate and inevitable[53] economic damages to the initial employer.[54]

The issue then becomes who should be held responsible for these damages and under what theory of recovery. Employers could first consider bringing a breach of contract claim against the departing employee to enforce applicable restrictive covenants.[55] In the absence of conduct that breaches a contract, claims under tort theories of recovery present a viable option.[56] Practically speaking, however, an employer's ability to recover under either theory against a departing employee is limited by the breadth of the individual's solvency.[57] Rather than attempting to recoup losses from the individual employee, employers could pursue the alternative *but for* cause of their damages—the recruiting firm who induced the employee's departure.[58]

IV. THE EMPLOYER/RECRUITING FIRM RELATIONSHIP

Employers that suffer economic loss when a vendor-recruiting firm poaches its employees should consider bringing claims directly against the recruiting firm.[59] Placing responsibility on the corporate party that

result . . . such a loss 'cannot be measured in money damages.'" (quoting FMC Corp. v. Taiwan Tainan Giant Indus., 730 F.2d 61, 63 (2d Cir. 1984))).

53. *See* Corp. Techs., Inc. v. Harnett, 943 F. Supp. 2d 233, 243 (D. Mass. 2013) (finding that disclosure of trade secrets would be inevitable and cause irreparable harm even though departing employee fully intended to protect plaintiff employer's confidential information), *aff'd*, 731 F.3d 6 (1st Cir. 2013).

54. *See* Advanced Equities, Inc. v. Maxwell, 2007 WL 1814574, at *2 (2007) (Bramnik, Arb.) (arbitrating employer's claims of "violation of Illinois Trade Secrets Act; conversion, unjust enrichment; breach of fiduciary duty; aiding and abetting breach of fiduciary duty; violation of Computer Fraud and Abuse Act; commercial disparagement; and slander" when competitor allegedly poached employer's key employees); s*ee also* Lester, *supra* note 43, at 51–53 (discussing trade secret law's shortcomings as they relate to an employer's ability to protect its interests fully when a competitor hires the employer's former personnel).

55. Moak, *supra* note 25, at 1 (explaining that due to the threat of breach of contract, "restrictive covenants are the only thing preventing your competitors from poaching your employees").

56. *See* Bob E. Lype, *Business Torts and Employment Law*, LYPE L. (2005), http://www.lypelaw.com/business-torts-and-employment-law.html (identifying ways employers can seek remedy for employee poaching absent a breach of contract claim).

57. *Cf.* Michael M. Gallagher, *Legal Malpractice Lawsuits in Texas and the Forgotten Rule of Collectability*, 53 S. TEX. L. REV. 101, 101 (2011) ("'It's all about bucks, kid. The rest is conversation.'" (quoting WALL STREET (20th Century Fox 1987))).

58. *See, e.g.*, JPMorgan Chase Bank, N.A. v. IDW Grp., LLC, No. 08 Civ. 9116, 2009 WL 321222, at *3 (S.D.N.Y. Feb. 9, 2009) (mem. op.) (demonstrating how an employer may assert a claim against a poaching recruiter rather than the recruited former employee).

59. *See, e.g.*, *id.* (providing illustration of injured employer's cause of action directly against its

transgressed the relationship to procure the employee's departure will minimize an employer's risk of expending substantial resources on litigation only to be awarded an unrecoverable judgment.[60] But as with most tort actions, an employer must demonstrate the existence of a duty, breach of that duty, and proximately caused damages.[61] Part III discussed available damages when a recruiter uses its clients as a candidate pool. This section focuses on the nature of the parties' relationship in order to determine the duties recruiting firms owe to their clients and the corresponding causes of action available for their breach.[62]

A. *Economic Agency Theory and Agency Law*

The first step in analyzing an employer's potential causes of action requires consideration of the underlying nature of a client-company's relationship with its vendor-recruiting firms.[63] This dynamic is characterized by a separation between the one doing the work (the recruiting firm) and the one needing the work done (the client-company)—placing it squarely within the definition of "agency" according to traditional economic agency theory.[64] This economic approach

vendor recruiting firm).

60. *Cf.* Darrell G. Stewart, *How to Deal with Deadbeat Clients*, GPSOLO, July/Aug. 2010, at 44, 55 ("The inability to pay—as opposed to an objection against payment—is an early indicator that you need to move on to other, productive matters as soon as possible. As the saying goes, you can't get blood out of a turnip.").

61. *See* Lype, *supra* note 56 (discussing the elements of a business tort cause of action).

62. Privity of contract between a recruiting firm and an injured employer establishes the underlying context for legal action for breach of fiduciary duty and breach of the implied covenant of good faith claims. Yet, search firms often poach employees from third-party employers with whom they lack a formal relationship. A cause of action based on tortious interference with existing or prospective business relations presents an interesting, plausible alternative where (1) no contractual relationship exists between the recruiting firm and the injured employer and (2) either breach of duty claim proves unworkable or unavailable in a particular jurisdiction. *See* Charles B. Vincent, *The Handling of a Claim for Tortious Interference with an At-Will Employment Contract in the Delaware State Courts Versus the Delaware District Court*, 12 DEL. L. REV. 121, 130–32 (2011) (exploring viability of former employer's tortious interference claim against employee's new employer where the underlying employment agreement was at-will). *Compare* RESTATEMENT (SECOND) OF TORTS § 766 (1979) ("One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the [resulting] pecuniary loss."), *with* RESTATEMENT (SECOND) OF TORTS § 766B (1979) ("One who intentionally and improperly interferes with another's prospective contractual relation . . . is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation.").

63. *Cf.* Vincent, *supra* note 62, at 122 (noting that in a claim for tortious interference, the sine qua non lies in the nature of the contractual relationship between the parties).

64. *See* Deborah A. DeMott, *Disloyal Agents*, 58 ALA. L. REV. 1049, 1050–51 (2007) (explaining that from the economist's perspective, an agency relationship arises anytime one "engages another to

considers how to best minimize the agency costs in relationships characterized by a separation between management and control.[65] The focus is not on the legal rights or responsibilities of the parties, but on how to leverage incentives to align the goals of the agent with the objectives of his principal.[66] This incentive-alignment component of agency theory underlies much of the recruiting operational paradigm—payment for performance only—and explains, conceptually, why recruiting firms might look to their clients as a source of potential candidates.

The contours of the recruiting firm-client employer dynamic are not as easily classified under agency law principles,[67] a fact which requires some exploration[68] because classification as an agency relationship has far-reaching implications in terms of the parties' duties and liabilities. An agent owes fiduciary duties to its principal and must act on its behalf within the scope of the agency relationship;[69] a principal can be held vicariously liable for the acts of its agent under the doctrine of respondeat superior.[70] Therefore, if a recruiting firm is acting as an agent of its principal client from a legal perspective, employers should be able to assert

perform a service," thereby delegating some of his decision-making discretion to the service-performer). S*ee generally* Jensen & Meckling, *supra* note 33, at 308 (offering classical conception of the principal agent conflict).

65. *See* Jensen & Meckling, *supra* note 33, at 328 (concluding it to be incorrect to equate the separation of management and control with agency costs).

66. *See* Eisenhardt, *supra* note 33, at 60 (pointing to optimal contract determination between principal and agent as the focus of agency theory).

67. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. b (2006) (discussing the divergent usage of agency terminology in commercial settings, academic literature, and legal definitions); s*ee also* DeMott, *Disloyal Agents*, *supra* note 64, at 1051 (contrasting the broad application of agency principles in economic literature with the narrower common law conception). *But see* Sitkoff, *supra* note 36, at 1042 (arguing modern law prefers fiduciary obligations as a regulatory response to the principal-agent problem). *See generally* Flannigan, *supra* note 34 (comparing the economic and legal literature regarding fiduciary accountability, agency principles, and opportunism).

68. *See* Eric W. Orts, *Shirking and Sharking: A Legal Theory of the Firm*, 16 YALE L. & POL'Y REV. 265, 271 (1988) ("When one considers both legal and economic accounts of agency, it becomes apparent that lawyers and economists do not fully understand on another. Lawyers often fail to appreciate the complexity of economic theories, and economists often overlook the complexity of the law of agency and enterprise organization.").

69. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. e (2006) (discussing fiduciary character of an agency relationship).

70. *See* RESTATEMENT (SECOND) OF AGENCY § 219 (1959) ("A master is subject to liability for the torts of his servants committed while acting in the scope of their employment."); *see also* ESSENTIAL FACTS: EMPLOYMENT § 1:8 (2013) (explaining that governmental enforcement agencies treat recruiting firms as agents of employers, which may make an employer jointly liable for a search firm's discriminatory practices). *See generally* John Dwight Ingram, *Liability of a Principal for Fraud or Abuse of Position by an Agent*, 17 WHITTIER L. REV. 85 (1995) (analyzing the doctrine of respondeat superior and vicarious liability).

duty-based causes of action when the relationship is transgressed.

According to the Restatement (Second) of Agency, an agency relationship "results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."[71] Relationships generally understood to fall within this category are those between employer and employee, lawyer and client, corporation and officer, and partnership and general partner.[72] A principal may also retain an agent for performance of specific services, such as in a common real-estate transaction.[73]

Establishment of a person's or an entity's classification as an agent—as opposed to an independent contractor—typically turns on the degree of control a principal may exert over the activities of the purported agent.[74] When one undertakes to provide a service to another, but is not controlled by the other, the appropriate label is independent contractor[75]—a distinction traditionally understood to remove one from the realm of agent/servant/employee status.[76] Section 200 of the Restatement (Second) of Agency sets forth ten factors for determining whether one acting for another is a servant (i.e., agent)[77] or an independent contractor:

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

71. RESTATEMENT (SECOND) OF AGENCY § 1 (1959).

72. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (2006) (discussing various agency relationships).

73. *See id.* (noting agency status attributed to a principal's retention of an agent to perform a specific service).

74. *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989) (emphasizing the role of control when applying thirteen factors to determine an individual's employee/independent contractor status). Of course parties to a contract could also declare or disclaim agency status in their contract. While persuasive, such language is not likely dispositive evidence of an agency relationship. *See* RESTATEMENT (THIRD) OF AGENCY § 1.02 (2006) ("Whether a relationship is characterized as agency in an agreement between parties or in the context of industry or popular usage is not controlling.").

75. *See* RESTATEMENT (SECOND) OF AGENCY § 2 (1959) (defining "independent contractor" as one who "contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control").

76. *See id.* cmt. b (contrasting a servant and an independent contractor).

77. *See id.* § 2 (equating "servant" with "agent").

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by the time or by the job;
(h) whether or not the work is a part of the regular business of the employer;
(i) whether or not the parties believe they are creating the relation of master and servant; and
(j) whether the principal is or is not in business.[78]

These factors are non-exhaustive;[79] they provide guidance in a totality-of-the-circumstances analysis to determine whether the hiring party possesses the right to control the manner and means by which the hired party accomplishes its objectives.[80] If the hired party maintains its independence, it should be classified as an independent contractor rather than an employee.[81]

Though it sounds simple enough, application of the "right-to-control" standard is increasingly varied and complex. For example, the Internal Revenue Service (IRS) includes direction in its Employer's Supplemental Tax Guide,[82] which both clarifies and confounds. The document initially explains that a person is an employee, not an independent contractor, if the employer maintains the right to control "what will be done and how it will be done."[83] It then goes on to provide a robust list of factors for use in determining the degree of control exercised by the employer[84]—with the admonition to ask the IRS if unsure which classification fits.[85] Despite this equivocation, one's right to control is not equivalent to one's

78. *See id.* § 220; *see also* RESTATEMENT (THIRD) OF AGENCY § 7.07 (2006) (defining employee as "an agent whose principal controls or has the right to control the manner and means of the agent's performance of work").

79. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324 (1992) (citing RESTATEMENT (SECOND) OF AGENCY § 220 (1959)).

80. *See id.* at 323 (reiterating the Court's holding in *Community for Creative Non-Violence v. Reid*, that consideration of an employer's right to control, informed by all incidents of the relationship, is determinative of an individual's employee or independent contractor status); *see also* Mark S. Matthewson, *Employee or Independent Contractor? How Not to Mess with the IRS*, ILL. B.J., Aug. 2013, at 429 (examining the IRS's focus on control in its twenty-factor test for determining whether an individual is an employee or an independent contractor).

81. *See* Matthewson, *supra* note 80, at 429 (distinguishing the independent contractor from the employee based on the amount of employer's control over the agent).

82. I.R.S., EMPLOYER'S SUPPLEMENTAL TAX GUIDE 15-A (2014); *see also* Matthewson, *supra* note 80, at 429 (summarizing the IRS's application of the right-to-control test).

83. I.R.S., EMPLOYER'S SUPPLEMENTAL TAX GUIDE 15-A, at 5 (2014).

84. *Id.* at 7.

85. *Id.* at 8.

degree of control.[86]

A company's relationship with its vendor-recruiting firm demonstrates this interplay. An employer does not likely possess the *right* to control a recruiter's activities, unless so stipulated by their contract.[87] Yet, the reality of their relationship might lead to a different conclusion regarding the *degree* of control actually exercised.[88] Determination would then turn on whether routine instructions—such as which candidates to target, where to place advertisements, which university's graduates to approach, or what forms to use in candidate screening and submission—constitute sufficient control in practice to elevate the recruiting firm from independent contractor status.[89]

Adding to the confusion, the Restatement (Second) of Agency goes on to explain, "[an independent contractor] may or may not be an agent."[90] Thus, even a balancing inquiry which results in an independent contractor label does not definitively settle the question as to whether or not a person or entity satisfies the elements of agency—a confusion addressed by both the Restatement (Third) of Agency[91] and the courts.[92] It follows then, that even though a recruiting firm would most likely be classified as an independent contractor under the prevailing right-to-control standard, it may still qualify as an agent under agency law principles.[93]

Navigating the blurry boundary between agent and independent-contractor status is pivotal in the context of executive search firms. If categorized as an agent, a recruiting firm owes its client fiduciary duties[94]

86. The logical distinction between the two concepts is clear. Consider parents as an example. A parent may possess a right to control her children distinct from the degree of control she is able to exercise at any given moment. One evening with toddlers at Chuck E. Cheese would quickly demonstrate this proposition. *See* RESTATEMENT (THIRD) OF AGENCY § 7.07 (2006) (including a principal's control de jure and de facto in its definition of an employee).

87. *But see id.* § 1.02 cmt. a (positing that the existence of an agency relationship is a factual inquiry wherein the parties' label is not dispositive).

88. *See* I.R.S., EMPLOYER'S SUPPLEMENTAL TAX GUIDE 15-A, at 7 (2014) (illustrating the three categories under which the degree of control may fall).

89. *See id.* at 8 (providing industry examples of the both employee and independent contractor status).

90. RESTATEMENT (SECOND) OF AGENCY § 2 (1959).

91. RESTATEMENT (THIRD) OF AGENCY § 1.02 cmt. c (2006).

92. *See* Wiggs v. City of Phoenix, 10 P.3d 625, 628 (Ariz. 2000) (en banc) (holding that many independent contractors are also agents (referencing RESTATEMENT (SECOND) OF AGENCY § 2 (1959))); *see also* J.K. *ex rel.* R.K. v. Dillenberg, 836 F. Supp. 694, 699 (D. Ariz. 1993) ("[A]n independent contractor and an agency relationship are not mutually exclusive concepts.").

93. *See* ESSENTIAL FACTS: EMPLOYMENT § 1:8 (2013) (stating that personnel service firms such as employment agencies or executive search firms are "viewed by government enforcement agencies as 'agents' of employers").

94. *See* RESTATEMENT (SECOND) OF AGENCY § 1 (1959) (describing the nature of agency as a

within the scope of their agency relationship.[95] Claims for breach of fiduciary duty would therefore arise from activities that transgress this duty, affording context for a cause of action when the search firm poaches its client's employees.[96]

B. *Common Law Fiduciary Obligations*

Even if an employer fails to qualify its vendor-recruiting firm as an agent (or decides not to pursue that route in order to avoid the potential consequences of agency status),[97] fiduciary duties might still attach to the relationship under common law principles.[98] Certain relationships are recognized as categorically fiduciary. These include, but are not limited to, trustee–beneficiary, attorney–client, employee–employer,[99] agent–principal, and corporate director–corporation relationships.[100]

Other fiduciary relationships arise when particular facts demonstrate one party's placement of special trust and confidence in another who appears to tacitly accept the transfer and thus his fiduciary role.[101]

"fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control"). *But see* Larry E. Ribstein, *Fencing Fiduciary Duties*, 91 B.U. L. REV. 899, 903 (2011) ("[A] fiduciary relationship necessarily is an agency relationship but an agency relationship is not necessarily a fiduciary relationship.").

95. A recruiting firm's fiduciary duties to its client would only extend as far as the scope of the parties' relationship—the recruitment of personnel. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. e (2006) (confining a principal's duties to its agent and an agent's duties to its principal to the scope of their agency relationship).

96. *See* D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1410–11 (2002) (analyzing the breach of fiduciary duty in the context of agent opportunism).

97. *See* RESTATEMENT (SECOND) OF AGENCY § 219 (1959) (imposing vicarious liability on employers for servants' torts "committed while acting in the scope of their employment"); *see also* ESSENTIAL FACTS: EMPLOYMENT § 1:8 (2013) (classifying recruiting firms as agents of the employers they represent).

98. *See* ESSENTIAL FACTS: EMPLOYMENT § 1:8 (2013) (attaching liability upon discrimination by an agency or a search firm).

99. *See* Bob E. Lype, *A Murky Intersection Between Employment Law and 'Business Torts,'* 38 TENN. B.J. 27, 29–30 (2002) (characterizing the employer–employee relationship as a principal–agent relationship wherein an employee owes fiduciary duties to his employer whether bound by express agreement or otherwise).

100. *See* 3 DAN B. DOBBS ET AL., THE LAW OF TORTS § 697 (2d ed. 2011) (listing categorical or formal fiduciary relationships); *see also* Cooter & Freedman, *supra* note 36, at 1046 (analyzing familiar fiduciary relationships); Scott FitzGibbon, *Fiduciary Relationships Are Not Contracts*, 82 MARQ. L. REV 303, 306–08 (1999) (offering extensive list of relationships courts consider fiduciary).

101. *See* 3 DOBBS ET AL., *supra* note 100, § 697 (commenting that particular facts may give rise to fiduciary relationships that do not fit into the categorical or formal categories); *see also* Gracey v. Eaker, 837 So. 2d 348, 352 (Fla. 2002) (stating fiduciary relationships arise "where confidence is reposed by one party and a trust accepted by the other . . . [t]he origin of the confidence is immaterial"); Johnson v. Reiger, 93 P.3d 992, 999 (Wyo. 2004) (holding fiduciary relationships "are not created by the unilateral decision to repose trust and reliance, but derive from the conduct or

Clearly, a recruiting firm's relationship with its client does not fall into a formal fiduciary category.[102] When viewed through the appropriate theoretical framework, however, the existence of a relationship of trust and confidence is difficult to ignore.

Generally, arm's-length transactions do not give rise to fiduciary duties.[103] Commercial parties are expected to pursue their unique, even divergent, interests short of fraud or illegal activity.[104] As Judge Posner explained, "Contract law does not require parties to behave altruistically toward each other; it does not proceed on the philosophy that I am my brother's keeper. That philosophy may animate the law of fiduciary obligations but parties to a contract are not each other's fiduciaries."[105]

Transformation of an arm's-length transaction into one that imposes fiduciary duties is possible, however. Commercial parties' *behavior* post-contract formation can elevate the relationship to one of special trust and confidence where one party assumes "responsibilities not required by the transaction, thereby leading the other party to reasonably believe that the first party is acting on behalf of the other party's interests."[106] Because the unique relationship between a client company and its vendor-recruiting firm often takes on this elevated character, its status as a fiduciary relationship should be considered.[107]

undertaking of the purported beneficiary"); John F. Mariani et al., *Understanding Fiduciary Duty*, 84 FLA. B.J. 20, 21 (2010) (noting fiduciary relationships "need not be legal" but may arise in other circumstances involving "a relation of trust and confidence").

102. *See* 3 DOBBS ET AL., *supra* note 100, § 697 (noting fiduciary relationships that do not fit into formal categories).

103. *See* Kham & Nate's Shoes No. 2, Inc. v. First Bank, 908 F.2d 1351, 1357 (7th Cir. 1990) ("Parties to a contract are not each other['s] fiduciaries.").

104. *See* Mariani et al., *supra* note 101, at 26 ("The parties in an arm's[-]length business transaction are viewed as rightfully pursuing their own, often divergent interests, with no duty to protect or benefit the other party or to disclose facts that the other party could, by its own diligence, discover."); *see also* 3 DOBBS ET AL., *supra* note 100, § 697 (qualifying party's right to serve its own interests in a commercial transaction does not include misrepresentation or illegal activity).

105. Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, 970 F.2d 273, 280 (7th Cir. 1992).

106. Mariani et al., *supra* note 101, at 26; *see also* Deborah A. DeMott, *Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences*, 48 ARIZ. L. REV. 925, 944 (2006) (analyzing EBC 1, Inc. v. Goldman, Sachs & Co, 832 N.E.2d 26 (N.Y. 2005), wherein an arm's-length transaction between a corporation and the lead underwriter for its IPO evolved into one imposing fiduciary duties because the parties "created a relationship of higher trust" than that required by the terms of the contract). *But see* Ribstein, *supra* note 94, at 902 (arguing fiduciary duties should only arise by contract).

107. Though the parties could have bargained for fiduciary duties at the contract drafting stage, their failure to do so is not dispositive. The ability of a fiduciary duty to arise from the reality of parties' relationship is a widely accepted tenet of fiduciary law. *See* D. Gordon Smith, *supra* note 96, at 1413–14 (discussing various circumstances wherein fiduciary relationships are created, other than

Recent scholarship characterizes the law regarding fiduciary relationships as nuanced and complex.[108] Professor Gordon Smith's analysis[109] of fiduciary duty through the lens of critical resource theory seeks to clarify and unify this messy[110] tangle[111] of case law, providing a theoretical framework for use in understanding and applying the common law. This approach combines the central tenant of agency theory—the allocation of discretion (by the principal) to a person (the agent) who acts on behalf of another—with the requirement that this discretion must concern a "critical resource" of the principal.[112] Smith's framing of what constitutes a critical resource builds upon the well-established concept that one who handles *property* for the beneficial owner is subject to fiduciary duties.[113] A critical resource includes not only those items traditionally considered property but also assets such as confidential information, a business opportunity, or a corporate enterprise.[114] The beneficial owner's delegation of discretion to another regarding a critical resource thus exposes the beneficial owner to vulnerability against opportunism[115] by

by contract). Perhaps demonstrating the complexity of fiduciary law, courts routinely focus on the contract drafting stage and ignore what happens next. *See* Ne. Gen. Corp. v. Wellington Adver., Inc., 624 N.E.2d 129, 132 (N.Y. 1993) ("If [the defendant] wanted fiduciary-like relationships or responsibilities, it could have bargained for and specified for them in the contract."); *see also* Forum Pers., Inc. v. David J. Greene & Co., No. 01-402, 2002 WL 424344, at *1 (N.Y. App. Div. March 14, 2002) (per curiam) (focusing too narrowly on the recruiting firm and employer's contract as determinative evidence that the parties did not create a fiduciary or agency relationship).

108. *See* D. Gordon Smith, *supra* note 96, at 1400 ("[T]he prevailing view remains that fiduciary law is 'elusive.'"); s*ee also* Mariani et al., *supra* note 101, at 20 (considering the various judicial approaches and academic theories that seek to isolate a unifying principle of fiduciary duty).

109. D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399 (2002).

110. *See id.* at 1400 (characterizing the law on fiduciary relationships is "messy").

111. *See* Ellen M. Bublick, *Economic Torts: Gains in Understanding Losses*, 48 ARIZ. L. REV. 693, 705 (2006) (referring to the "tangle" of case law on fiduciary duties).

112. *Compare* Jensen & Meckling, *supra* note 33, at 308 (defining agency relationships as contracts wherein one person engages another "to perform some service on their behalf which involves delegating some decision making authority to the agent"), *with* D. Gordon Smith, *supra* note 96, at 1402 (advocating that fiduciary relationships "form when one party . . . acts *on behalf of* another party . . . while exercising *discretion* with respect to a critical resource belonging to the beneficiary").

113. *See* D. Gordon Smith, *supra* note 96, at 1403–04 (exploring property-based theories as constructs for application of fiduciary duties).

114. *See* Cooter & Freedman, *supra* note 36, at 1048 n.6 (noting assets at the core of a fiduciary relationship may be comprised of much more than traditional property such as land or cash); *see also* D. Gordon Smith, *supra* note 96, at 1404 ("The important point is that *something* lies at the core of fiduciary relationship and binds the fiduciary to the beneficiary.").

115. *But see* DeMott, *Breach of Fiduciary Duty*, *supra* note 106, at 936 (countering Smith's assertion that a principal's vulnerability is derived from an agent's discretion over a critical resource with suggestion that something "more" is required).

the fiduciary to appropriate or use the resource to his own advantage.[116]

For Smith's critical resource theory, the typical costs associated with agency—asymmetry of information and imperfect monitoring and control capacities—generate the nexus of vulnerability in fiduciary relationships. Access and the opportunity to exploit a critical resource of the principal serves as justification for "imposition of status or fact-based fiduciary accountability."[117] It is the principal's vulnerability to an agent's opportunistic advantage taking which imposes fiduciary duties,[118] rather than the traditionally conceived requirements of dominance and superiority.[119]

The central inquiry then turns to whether the executive search firm/client-company dynamic satisfies these requirements and should therefore be recognized as a fiduciary relationship under common law principles.[120] Employers' transfer of confidential information, as is typical of all client-recruiting firm relationships, seems to fulfill Smith's critical-

116. *See* Sitkoff, *supra* note 36, at 1049 (concluding that the potential for abuse in agency relationships underpins the law's requirement of other-regarding behavior from a fiduciary); *see also* Flannigan, *supra* note 34, at 394 (noting an agent's access to the opportunities and assets of his principal can lead to their exploitation for the agent's self-interest).

117. Flannigan, *supra* note 34, at 394.

118. *See* Cooter & Freedman, *supra* note 36, at 1048 (identifying the separation between ownership and management in the principal-agent model forces agents to choose between other-regarding behavior on behalf of the principal and self-serving behavior at the principal's expense); *see also* Sitkoff, *supra* note 36, at 1043 (arguing the aim of fiduciary duties is to induce fiduciary agents to avoid self-dealing). *But see* DeMott, *Breach of Fiduciary Duty*, *supra* note 106, at 936 (advocating that the determinative criterion for a fiduciary relationship should be whether the purported beneficiary of the duty would be "justified in expecting loyal conduct on the part of an actor and whether the actor's conduct contravened that expectation").

119. *See* D. Gordon Smith, *supra* note 96, at 1468 (observing that relationships between commercial parties "always involve parties with disparate positions. It is difficult to imagine a situation in which the parties are perfectly symmetrical. . . . [T]he focus on domination, influence, or disparity of position leads to an uncertain inquiry into *how much different is different enough* to justify the imposition of fiduciary duties.").

120. When considering whether fiduciary duties should be applied to recruiting firms under common law principles, this comment makes the assumption that the parties' contract did not expressly provide for fiduciary duties in their agreements. If they did, employers could pursue breach of contract claims where its vendor-recruiting firms poached the client company's employees for placement with another employer. The contractarian approach argues that if corporations and recruiting firms desired heightened protections and duties within their relationship, they would negotiate for them at the contract stage, and where such negotiation does not occur, the law should not come in and rewrite the contract's terms. *See* Claire Moore Dickerson, *From Behind the Looking Glass: Good Faith, Fiduciary Duty & Permitted Harm*, 22 FLA. ST. U. L. REV. 955, 975 n.79 (1995) (explaining Judge Posner's belief that contractual silence rebuts the presumptive presence of fiduciary duties); *see also* Sitkoff, *supra* note 36, at 1042 (contending the fiduciary duty of loyalty's gap filling function minimizes transaction costs and agency costs because parties are not required to reduce every possible contingency to writing).

resource requirement.[121] Information is routinely transferred from hiring manager to recruiter regarding a company's hiring needs, compensation structure, employee development initiatives, operational practices, key personnel, and areas of future growth.[122] Companies provide recruiters with this proprietary information in order to facilitate a match between a recruiter's qualified candidates and the client's culture.[123] Despite these performance objectives, it is the trust and confidence a corporation reposes in its search consultant that creates an environment conducive for transfer.[124]

A corporation is exposed to potential opportunism by its vendor-recruiting firm when it delegates discretion as to how its recruiting firm best utilizes the company's proprietary information to attract candidates.[125] For instance, a recruiting firm could take information about its client's below-market pay scale or unreasonable performance expectations and use those facts to target and then induce the client's employees to join the ranks of a competitor *also* represented by the recruiting firm. Even when nothing in their contract stipulates this information must be kept confidential or used only to the advantage of the client-company, the employer implicitly expects this sort of other-mindedness from its recruiters.[126] An employer's delegated discretion to the recruiter over a critical resource exposes the employer to this sort of opportunistic advantage taking—a vulnerability epitomizing circumstances wherein critical resource theory imposes fiduciary duties.[127]

121. *See* D. Gordon Smith, *supra* note 96, at 1444 (labeling confidential information as "[t]he most important category of potential 'critical resources'").

122. *See, e.g.*, JPMorgan Chase Bank, N.A. v. IDW Grp., LLC, No. 08 Civ. 9116, 2009 WL 321222, at *9–10 (S.D.N.Y. Feb. 9, 2009) (mem. op.) (illustrating a search firm's access to employer's trade secrets for use in search firm's recruiting efforts).

123. *See, e.g.*, *id.* (indicating potential candidates' expectations of information from the search firm's recruiter).

124. Mariani et al., *supra* note 101, at 21 (noting fiduciary relationships may arise in circumstances involving "a relation of trust and confidence").

125. An employer's delegation of discretion could also be used as evidence of the recruiter's independence for employee/independent contractor classification purposes. *See* RESTATEMENT (SECOND) OF AGENCY § 220 (1959) (including a principal's right and extent of control as factors in making a servant/independent contractor determination).

126. Employers would not deliberately divulge proprietary information to a recruiter it believed would use that information to benefit the recruiter at the expense of the employer or, even worse, to the benefit of a competitor. *See* Cooter & Freedman, *supra* note 36, at 1048 (discussing the misappropriation theory and the agent's fiduciary duty to the principal).

127. *See* D. Gordon Smith, *supra* note 96, at 1497 (arguing that a principal's vulnerability to opportunism with regard to a critical resource should impose fiduciary duties on his agent in order to align the parties' incentives).

1. Breach of Fiduciary Duty Claim

Employers' ability to substantiate the existence of a fiduciary relationship with its recruiting firm-vendors significantly impacts the claims and remedies[128] available to employers when recruiters engage in opportunistic behavior; if established, a breach of fiduciary duty claim presents a viable avenue of recovery when an employer's vendor-recruiting firm poaches the employer's current employees.

According to Section 874 of the Restatement (Second) of Torts, "One standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation."[129] The duty imposed by the fiduciary relationship is typically referred to as the duty of loyalty[130]—an agent's core obligation to act for the principal's benefit in circumstances connected with the agency relationship.[131] A breach of the duty of loyalty typically stems from either "(1) a conflict between the principal's interests and the agent's pursuit of the agent's own interests or (2) a conflict between or among the interests of multiple principals represented by the same agent."[132] Poaching from one client to fill the job order of another involves both types—(1) the conflict between the recruiting firm's interest in most efficiently making placements and the client's interest in retaining valuable personnel, and (2) the inherent conflict of interests where the same recruiter represents multiple employer principals in pursuit of a limited number of qualified candidates.

The fiduciary duty of loyalty encompasses several obligations especially relevant for the current discussion: the duty not to transact "with the principal as[,] or on behalf of," a party adverse to the principal's interests;[133] the obligation not to assist the principal's competitors

128. *See* DeMott, *Disloyal Agents*, *supra* note 64, at 1056 (characterizing the robust remedies available to a beneficiary when its fiduciary breaches the duty of loyalty as a "rich mixture derived from contract law, tort law, and restitution and unjust enrichment"); *see also* Sitkoff, *supra* note 36, at 1048 (discussing a principal's entitlement to elect among various remedies, including compensatory damages or disgorgement of profits related to the breach of fiduciary duty).

129. RESTATEMENT (SECOND) OF TORTS § 874 (1979).

130. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. e (2006) (generalizing agent's duties to his principal as the requirement that he "act loyally" on the principal's behalf and in his interest).

131. *See* Frances S. Fendler, *A License to Lie, Cheat, and Steal? Restriction or Elimination of Fiduciary Duties in Arkansas Limited Liability Companies*, 60 ARK. L. REV. 643, 646 (2008) (highlighting a fiduciary's core obligation to act for another party in the exercise of the agent's power and discretion); *see also* DeMott, *Breach of Fiduciary Duty*, *supra* note 106, at 926 (explaining the duty of loyalty combats a fiduciary's self-dealing and opportunistic advantage-taking).

132. DeMott, *Disloyal Agents*, *supra* note 64, at 1053.

133. RESTATEMENT (THIRD) OF AGENCY § 8.03 (2006).

throughout the duration of the agency relationship;[134] and the duty not to use the principal's property or confidential information for the purposes of the agent itself or a third party.[135] Poaching a client's employees while engaged to help the same client bring additional employees on board transgresses each of these boundaries and provides a strong case for a breach of fiduciary claim.[136]

2. Breach of the Implied Covenant of Good Faith and Fair Dealing Claim

If an employer fails to demonstrate the existence of a fiduciary relationship with its search firm-vendors under agency principles or the common law, a violation of the implied covenant of good faith and fair dealing should be alleged in the alternative.[137] Despite their legal distinction,[138] the concepts of fiduciary duty and the implied covenant of good faith share a common theoretical underpinning,[139] often characterized as abstract and imprecisely defined.[140]

Essentially, good faith serves as a contractual gap filler in arm's-length transactions, imposing a duty on the parties not to engage in opportunistic advantage taking not contemplated at the time of contract drafting.[141] Fiduciary duties, on the other hand, serve as equitable gap filler in arm's-length transactions where the parties create a heightened relationship of

134. *Id.* § 8.04.

135. *Id.* § 8.05.

136. *See id.* § 8.04 (stating that, in an agency relationship, a breach of fiduciary duty occurs when the agent acts against his principal or for the principal's competitor).

137. This theory is definitively the less desirable alternative, however, because of the difficulty in successfully pleading a claim. *See* Monica E. White, Abstract, *"Package Deal": The Curious Relationship Between Fiduciary Duties and the Implied Covenant of Good Faith and Fair Dealing in Delaware Limited Liability Companies*, 21 U. MIAMI BUS. L. REV. 111, 135 (2013) (asserting plaintiffs' contractual Implied Covenant claims do not often succeed).

138. *But see* Dickerson, *supra* note 120, at 993 (critiquing the distinction as supported solely by tradition and formalism).

139. *See* Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 438 (1993) (depicting the relationship between the implied covenant of good faith and fiduciary duties as "a blur . . . not a line").

140. *See* D. Gordon Smith, *supra* note 96, at 1400 (pointing to a lack of unification in fiduciary duty theory); *see also* White, Abstract, *supra* note 137, at 127 (contrasting common usage of the good faith and fair dealing concept with its vague conceptualization and definition); Robert M. Phillips, Comment, *Good Faith and Fair Dealing Under the Revised Uniform Partnership Act*, 64 U. COLO. L. REV. 1179, 1185 (1993) (referring to the implied covenant's definition as "elusive").

141. *Compare* Mariani et al., *supra* note 101, at 26 (noting commercial actors' right to pursue their own interests "with no duty to protect or benefit the other party"), *with* Kham & Nate's Shoes No. 2, Inc. v. First Bank, 908 F.2d 1351 (7th Cir. 1990) (including the obligation not to take opportunistic advantage as part of the duty of good faith).

trust and confidence not otherwise required by their agreement.[142] Professor Dickerson describes the concepts' relationship as follows:

> [G]ood faith and fiduciary duty represent application of the same parameters to facts at opposite ends of a single continuum. If the structure of the relationship creates no more power and no greater conflict of interest in the actor than in the other party, the transaction is at the good faith end of the continuum. In contrast, if the structure of the relationship grants extensive power to the actor, and puts it in a position of significant conflict of interest vis-à-vis the other party, the transaction is at the fiduciary end of the continuum.[143]

Claims involving a violation of the duty of good faith and those involving a breach of fiduciary duty, therefore, arise out of the same circumstances but turn on the distribution of power and conflicts of interest between the parties.[144] The same predicate facts for a breach of fiduciary duty claim could be used to bring a violation of the implied covenant of good faith and fair dealing cause of action.[145]

While fiduciary duties are typically discussed in positive terms as to what the duty of loyalty or duty of care require,[146] attempts to define the implied covenant are generally framed in the negative.[147] Definitions of the concept routinely point to an absence of bad faith rather than

142. *See* Sitkoff, *supra* note 36, at 1043 (noting the fiduciary duty of loyalty's gap filling); *see also* Mariani et al., *supra* note 101, at 26 ("An otherwise arm's[-]length business transaction may be converted into one imposing a fiduciary duty when a party takes on responsibilities beyond those required.").

143. Dickerson, *supra* note 120, at 958–59 (citations omitted); *see also* Market St. Assocs. v. Frey, 941 F.2d 588, 595 (7th Cir. 1991) (characterizing the duty of good faith as "halfway between a fiduciary duty (the duty of *utmost* good faith) and the duty merely to refrain from active fraud"); Andrew S. Gold, *On the Elimination of Fiduciary Duties: A Theory of Good Faith for Unincorporated Firms*, 41 WAKE FOREST L. REV. 123, 134 (2006) (depicting the duty of good faith and fiduciary duties as variations on a doctrinal theme with practical differences in the scope of their obligations).

144. *See* White, Abstract, *supra* note 137, at 130 (explaining the increased standard of conduct as one moves from contractual good faith to status-based fiduciary duties).

145. *See id.* (demonstrating how the concept of the implied covenant is encompassed by the concept of fiduciary duties).

146. *See, e.g.*, *Fiduciary Duties*, NAT'L ASS'N OF REALTORS (May 15, 2013), http://www.realtor.org/sites/default/files/handouts-and-brochures/2014/nar-fiduciary-duty-032213.pdf (offering concrete examples of those activities required of real estate brokers by the fiduciary duties of loyalty, confidentiality, disclosure, obedience, reasonable care and diligence, and accounting).

147. *See* White, Abstract, *supra* note 137, at 127 (suggesting that actions required by the implied covenant of good faith are typically described in the negative); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981) (explaining good faith "excludes a variety of types of conduct characterized as involving 'bad faith'").

affirmative behavioral standards that would satisfy the obligation.[148] Robert Summer's influential "excluder" approach classifies bad faith into six categories: "evasion of the spirit of the deal, lack of diligence and slacking off, willful rendering of only substantial performance, abuse of a power to specify terms, abuse of a power to determine compliance, and interference with or failure to cooperate in the other party's performance."[149] Poaching a client's employees while engaged to bring new people in the door arguably evades the spirit of the deal and demonstrates a lack of good faith.[150] The problem for employers, and why this cause of action is less desirable than breach of fiduciary duty, is its limited application.[151]

Contractual good faith fills contractual gaps "based on what the parties would have contracted for if they had addressed the contingency at issue."[152] The implied covenant does not function to "enforce a mandatory norm of business conduct,"[153] but rather as a contract interpretation tool when contracts are silent as to contingencies not contemplated. This ability is limited by the express language of the contract;[154] if a contract includes provisions that address particular contingencies, the express terms of the contract will be enforced to their fullest extent and will preempt any implied covenantal obligations.[155] For

148. *See* Robert S. Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 232–33 (1968) (analyzing good faith as standards of performance that lack bad faith).

149. *Id.*

150. *See* Lindsay & Santon, *supra* note 4, at 73 (describing the possible consequences of employee poaching).

151. *See* Gold, *supra* note 143, at 144 ("The impact of these developments in fiduciary law depends upon the applicability and content of contractual good faith duties.").

152. *Id.*

153. *Id.* at 146.

154. *See* Kham & Nate's Shoes No. 2, Inc. v. First Bank, 908 F.2d 1351, 1357 (7th Cir. 1990) (holding that principles of good faith fill in contractual gaps but "do not block use of terms that actually appear in the contract"); *see also* Gold, *supra* note 143, at 138 (commenting that the gap-filling function of the implied covenant of good faith is limited to contractual silences and must accord with the agreement's explicit text); White, Abstract, *supra* note 137, at 166 (noting common assertion that implied covenant of good faith cannot be employed to contradict express contractual provisions).

155. Though it might be difficult to accept that parties to an executive search agreement could possibly neglect to contemplate the possibility of employee poaching, reality proves this happens frequently; otherwise, sophisticated business parties would always negotiate for this contingency at contract drafting. *See, e.g.*, JPMorgan Chase Bank, N.A. v. IDW Grp., LLC, No. 08 Civ. 9116, 2009 WL 321222, at *1 (S.D.N.Y. Feb. 9, 2009) (mem. op.) (hearing a financial institution's claim against an executive search firm that recruited candidates for a competitor); *see also* Anenson, *supra* note 29, at 1 (noting increasing prevalence of lawsuits regarding the "cherry picking" of top employees in the modern business environment).

example, when provided for, a recruiter's use of confidential information or the solicitation of employees to poach its client's employees would then transgress its already delineated obligations under the parties' contract; a breach of the implied covenant claim in these instances would merely duplicate a breach of contract action.[156]

The argument could be made, however, that stealing a client's employees while engaged to recruit new ones contravenes the very intent and performance of the contract (i.e., evades the spirit of the deal).[157] The underlying premise would be that a recruiting firm's decision to accept engagement for search services by its client's competitor is incompatible with the recruiting firm's core obligation to the current client to provide advice and assistance in recruiting qualified candidates through use of the corporation's confidential information—an implied obligation "so interwoven in the whole writing of [the] contract as to be necessary for the effectuation of the purposes of the contract."[158] The recruiting firm's conflict of interest thereby removes the client's ability to rely on the search firm's fulfillment of its implied obligation to provide advice and assistance and use confidential information for the benefit of the client.[159]

Approaching a violation of the implied covenant of good faith claim from this vantage point avoids dismissal for duplication of a breach of contract claim when poaching-related contingencies are addressed by the agreement's terms.[160] Further, it precludes a defendant's argument that courts must not read in obligations that violate a contract's express terms since the performance of a recruiting contract presumes a client company can rely on recruiters to provide advice and assistance in the recruitment of personnel.[161]

156. *See* Summers, *supra* note 148, at 253–54 (delineating damages for relief under contractual recovery).

157. *See id.* at 234 ("Some judges recognize that to evade the spirit of a deal is to act in bad faith and thus is to commit a breach, even though the evasive conduct is within the letter of the agreement or the agreement is silent on the matter.").

158. SNS Bank v. Citibank, 7 A.D.3d 352, 355 (N.Y. App. Div. 2004) (citation omitted) (internal quotation marks omitted).

159. *Cf.* Dickerson, *supra* note 120, at 958–59 (considering conflicts of interest on a continuum).

160. *But see* Caron Beesley, *3 Ways to (Legally) Stop Your Competitors from Poaching Your Employees*, SBA BLOG (Mar. 2, 2012), http://www.sba.gov/community/blogs/community-blogs/business-law-advisor/3-ways-legally-stop-your-competitors-poaching-y (cautioning employers of the potential negative effects of these agreements).

161. *See* Summers, *supra* note 148, at 233 ("[A judge] who views himself as 'implying terms' is more likely to think he is remaking a contract to some extent—something which judges are reluctant to do.").

C. *Claim Viability*

JPMorgan Chase Bank, N.A. v. IDW Group, LLC[162] illustrates the plausibility of claims under both a breach of fiduciary duty and breach of the implied covenant of good faith and fair dealing. In 2009, JPMorgan Chase Bank (JPMorgan) brought breach of contract, breach of fiduciary duty, and breach of the implied covenant of good faith and fair dealing claims against executive search firm IDW Group (IDW).[163] JPMorgan alleged that, while engaged to perform executive search services for JPMorgan, IDW recruited six JPMorgan employees to work for Citadel, IDW's client and JPMorgan's competitor.[164]

JPMorgan argued that a fiduciary relationship existed between itself and IDW, despite the parties' failure to reference fiduciary duties expressly in their contract.[165] The court did not find the lack of an express provision dispositive, but explained "liability is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation."[166] JPMorgan alleged that the results from their ongoing relations with IDW were sufficient to establish a fiduciary relationship because of JPMorgan's reliance upon IDW's superior knowledge[167] of the marketplace for financial executives, the applicant

162. JPMorgan Chase Bank, N.A. v. IDW Grp., LLC, No. 08 Civ. 9116, 2009 WL 321222 (S.D.N.Y. Feb. 9, 2009) (mem. op.).

163. *See id.* at *1 ("In this lawsuit, JPMorgan alleges that IDW breached these agreements, breached the implied covenant of good faith and fair dealing, and breached its fiduciary duty to JPMorgan . . . ."); *see also* Complaint at 8, JPMorgan Chase Bank, N.A. v. IDW Grp., LLC, No. 08 Civ. 9116, 2009 WL 321222 (S.D.N.Y. Feb. 9, 2009) (mem. op.), 2008 WL 4919392, ¶ 33 (requesting at least $1 million in damages plus ongoing incidental and consequential damages associated with IDW's breach of fiduciary duty).

164. *JPMorgan Chase*, 2009 WL 321222, at *3 (emphasizing that Citadel, the company the six employees left to work for specialized in the same area of "alternative investment strategies and services" as JPMorgan).

165. *Id.* at *8.

166. *Id.* (quoting EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11, 19–20 (2005)); *see also* James Levine, *When Does a Contractual Relationship Give Rise to a Fiduciary Duty?*, LITIG. PRAC. GRP. NEWSL., Spring 2002, at 1, 3, *available at* http://www.dglaw.com/images_user/newsalerts/DG_NewsLetter_Litigation_Spring091.pdf (pointing to the *JPMorgan* decision as a caution to clients that courts will go beyond contractual language and consider the reality of a relationship when assessing breach of fiduciary duty claims).

167. *JPMorgan Chase*, 2009 WL 321222, at *9. Though this allegation seems to reverse the typical assumption that large financial institutions categorically occupy positions of superior power in the marketplace, legal scholarship challenges the traditional notion of dominance in the context of fiduciary relationships. *See* Easterbrook & Fischel, *supra* note 139, at 436 (implying that fiduciary duties do not serve to redress the conspicuous inequality in power and position between parties in a contract); *see also* D. Gordon Smith, *supra* note 96, at 1468 (stating that a focus on superiority of position generates an uncertain inquiry in the imposition of fiduciary duties).

pool, and general recruiting principles.

In addition to its superior knowledge contention, JPMorgan pointed specifically[168] to its entrustment of IDW with confidential information for the purpose of effectively matching candidates to JPMorgan's hiring needs[169] and IDW's opportunity to leverage its relationship with JPMorgan to foster relationships with JPMorgan employees.[170] If proven, these facts would have taken the case far beyond an "ordinary, garden-variety arm['s-]length business transaction."[171] JPMorgan alleged that IDW acted as its advisor in the relationship, "a position of extraordinary trust, and under circumstances in which it assumed, and may have been entitled to assume, that IDW would act with JPMorgan's best interests in mind."[172]

The court dismissed JPMorgan's first breach of implied covenant claim with regard to IDW's solicitation of JPMorgan's personnel because of its reliance on the same allegations in the accompanying breach of contract claim.[173] Because the parties' contract contained a non-solicitation provision, JPMorgan could not simultaneously allege an express contractual and implied covenantal violation based on the same underlying activities.[174] The court nonetheless allowed JPMorgan's second implied

168. *See* Mariani et al., *supra* note 101, at 23 ("Because determining when a fiduciary duty exists is often a fact-intensive inquiry, conclusory allegations that one party placed 'trust and confidence' in another are typically insufficient to plead a fiduciary relationship.").

169. *See JPMorgan Chase*, 2009 WL 321222, at *10 ("To ensure that IDW could render the [s]ervices effectively, IDW was made privy to highly confidential and sensitive information regarding JPMorgan and its businesses.").

170. *See id.* ("[S]olely by virtue of the relationship established between JPMorgan and IDW, IDW was able to create, cultivate, and foster relationships with JPMorgan employees.").

171. *Id.*

172. *Id.* at *9–10. Not only would these facts, if proven, *remove* the parties' relationship from the garden variety arm's-length transaction category, they would also *affirm* that the parties' relationship was substantially similar to the garden-variety recruiting firm-client company relationship. The logical corollary to this conclusion is that the typical recruiting firm-client employer relationship is *something more* than an arm's-length transaction, placing it outside the reach of associated limitations on the applicability of fiduciary and agency principles. *But see* Kenneth J. Vanko, JPMorgan *Lawsuit May Highlight New York Docket in 2009*, LEGAL DEVS. IN NON-COMPETITION AGREEMENTS (Jan. 6, 2009), http://www.non-competes.com/2009/01/jpmorgan-lawsuit-may-highlight-new-york.html (labeling JPMorgan's claim that it possessed a "heightened relationship [with IDW] that transformed an ordinary commercial deal into one cloaked with fiduciary obligations" as bizarre, though vigorously defended).

173. *JPMorgan Chase*, 2009 WL 321222, at *5; *see also* Forum Pers., Inc. v. David J. Greene & Co., No. 01-402, 2002 WL 424344, at *1 (N.Y. App. Div. Mar. 14, 2002) (per curiam) (affirming dismissal of an employer's breach of the implied covenant of good faith claim against a search firm because the employer failed to prove the recruiter's conduct deprived it of any rights established by their contract).

174. *See JPMorgan Chase*, 2009 WL 321222, at *5 ("[T]o simultaneously plead breach of contract

covenant claim to proceed on allegations that centered on IDW's failure to disclose its recruiting relationship with competitor Citadel to JPMorgan.[175] The court explained that the factual predicates for the implied covenant claim—IDWs failure to notify JPMorgan of the search firm's retention by Citadel—and the breach of contract claim—IDW's active role in utilizing JPMorgan's confidential information to recruit and solicit its employees—were distinct and therefore able to be brought concurrently.[176]

Though never decided on its merits,[177] *JPMorgan Chase* illustrates the potential viability of breach of fiduciary duty and breach of the implied covenant of good faith and fair dealing claims as avenues for recovery in the context of employer/recruiting firm relationships.[178] Their ultimate utility will only be determined as the claims are plead and tried in various jurisdictions across the country.

V. CONSIDERATIONS FOR TEXAS EMPLOYERS AND PRACTITIONERS

Several factors and strategies should be considered for claims brought specifically in Texas. As with other jurisdictions, the causes of action available to Texas employers when a vendor-recruiting firm poaches employees will turn on courts' classification and treatment of the relationship.[179]

Texas uses the common law right-to-control standard to draw the line between independent contractor and employee.[180] Since both parties

and implied covenant claims under New York law, a plaintiff must allege an implied duty that is consistent with the express contractual terms, but base its implied covenant theory on allegations that are distinct from the factual predicate for its contractual claims.").

175. *Id.* at *6 (alleging that IDW's failure to disclose its concurrent retention by competitor Citadel deprived JPMorgan of the "fruits" of the parties' agreement, including an "ability to rely upon IDW to provide advice and assistance in obtaining . . . the best and most qualified talent").

176. *See id.* (dismissing JPMorgan's non-solicitation theory of liability).

177. *See id.* at *13 ("Because JPMorgan has plausibly alleged the existence of a fiduciary relationship and has stated a cause of action that is sufficiently distinct from its breach of contract claims, IDW's motion to dismiss Count Four of the Complaint is denied.").

178. *Compare id.* at *7–9 (allowing employer's breach of fiduciary duty and breach of the implied covenant of good faith claims to proceed), *with* Forum Pers., Inc. v. David J. Greene & Co., No. 01-402, 2002 WL 424344, at *1 (N.Y. App. Div. Mar. 14, 2002) (per curiam) (holding that search firm was not liable for poaching client's employees because (1) no fiduciary duty was contracted for by the parties and (2) the recruiting company's conduct did not deprive the employer of any rights under the parties' contract).

179. *See, e.g.*, Newspapers, Inc. v. Love, 380 S.W.2d 582, 588–90 (Tex. 1964) (exploring the effects of control on a contractual relationship).

180. *See id.* at 590 (adopting the right-to-control test for use in determining a master-servant relationship).

maintain the right to control their own activities by contract, a recruiting firm likely would be treated as an independent contractor.[181] An argument via common law that recruiting firms and employers enjoy a "special" relationship giving rise to heightened rights and responsibilities presents a more viable option than the agency law strategy.[182] Texas practitioners should use the reality of the parties' relationship to demonstrate the existence of something more than a garden-variety arm's-length transaction.[183]

Practitioners might also analogize the role of a recruiting firm to that of a real estate broker in a real estate transaction as a way to demonstrate the heightened nature of the relationship.[184] Employers could point to the substantial effects of recruiting firm activity on potential candidates, employers, and ultimately the economy as a whole to demonstrate the weightiness of their impact.[185] An employer's entrustment of its recruiter with confidential information and the recruiter's acceptance (tacit or actual) of this trust should be demonstrated by specific facts.[186]

Should a Texas employer succeed in convincing a court that this relationship is special enough to warrant imposition of heightened rights and responsibilities, two significant causes of action are available. If classified as a fiduciary relationship under common law principles, then employers should bring a breach of fiduciary duty claim.[187] Additionally, whether classified as a true fiduciary relationship or a quasi-fiduciary relationship involving something more than an arm's-length transaction,

181. *But see* McDonnell v. Glover, No. 05-01-00837-CV, 2002 WL 47798, at *1 (Tex. App.—Waco Jan. 15, 2002, no pet.) (mem. op., not designated for publication) (referring to recruiting firm as agent of employer).

182. *But see* Coleman v. Klockner & Co. AG, 180 S.W.3d 577, 588 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (discussing when agency principles may be applicable).

183. *See id.* (holding that an agency relationship may be proven by "underlying facts or direct and circumstantial evidence" (citing Schultz v. Rural/Metro Corp., 956 S.W.2d 757, 760 (Tex. App.—Houston [14th Dist.] 1997, no pet.))).

184. *See Fiduciary Duties*, NAT'L ASS'N OF REALTORS (May 15, 2013), http://www.realtor.org/sites/default/files/handouts-and-brochures/2014/nar-fiduciary-duty-032213.pdf (detailing the fiduciary responsibilities of real estate brokers).

185. *See, e.g.*, Josh Bersin, *LinkedIn Is Disrupting the Corporate Recruiting Market*, FORBES (Feb. 12, 2012, 2:21 PM), http://www.forbes.com/sites/joshbersin/2012/02/12/linkedin-is-disrupting-the-corporate-recruiting-market/ (providing an economic perspective of LinkedIn's recruiting procedures).

186. *See* JPMorgan Chase Bank, N.A. v. IDW Grp., LLC, No. 08 Civ. 9116, 2009 WL 321222, at *9–10 (S.D.N.Y. Feb. 9, 2009) (mem. op.) (mentioning specific facts regarding an employer that pointed to a potential fiduciary relationship).

187. *See* Jones v. Blume, 196 S.W.3d 440, 447 (Tex. App.—Dallas 2006, pet. denied) (including tort elements of a breach of fiduciary duty cause of action).

employers should consider a breach of the duty of good faith *tort* claim.[188] Contrary to the overwhelming majority's approach,[189] Texas does not impose a covenant of good faith and fair dealing in performance of a contract.[190] In *English v. Fischer*,[191] the Supreme Court of Texas described the implied covenant as a "laudatory sounding theory . . . [which] would abolish our system of government according to settled rules of law."[192] Contractual claims against recruiting firm vendors under a breach of the implied covenant of good faith and fair dealing theory would not likely survive summary judgment.[193]

On the other hand, tort claims based on the duty of good faith and fair dealing present a plausible avenue of recovery when a plaintiff can establish the existence of a special relationship with the defendant.[194] The crucial considerations are first, the nature of the parties' relationship, and second, the existence of distinct predicate facts than those for a breach of contract claim.[195] The possibility of relief under this theory requires a special relationship.[196]

The term "special" is often used to describe a fiduciary relationship based on trust and confidence.[197] Courts do not always draw the line so narrowly. Even a "quasi-fiduciary" relationship may be enough to lay the foundation for the cause of action.[198] In *Saucedo v. Homer*,[199] the court

188. *See* Evelyn T. Ailts, Comment, *A New Tort for Texas: Breach of the Duty of Good Faith and Fair Dealing*, 18 ST. MARY'S L.J. 1295, 1319–23 (1987) (analyzing a breach of the duty of good faith and fair dealing in the context of tort law).

189. *See id.* at 1296 ("As a derivate contract principle, the good faith covenant has been adopted as implied in every contract by . . . a strong majority of jurisdictions.").

190. *See* English v. Fischer, 660 S.W.2d 521, 522 (Tex. 1983) (holding a contractual duty of good faith is not an implied covenant in every contract).

191. English v. Fischer, 660 S.W.2d 521 (Tex. 1983).

192. *Fischer*, 660 S.W.2d at 522.

193. *See* Evelyn T. Ailts, Comment, *A New Tort for Texas: Breach of the Duty of Good Faith and Fair Dealing*, 18 ST. MARY'S L.J. 1295, 1299–1300 (1987) (delineating the history of Texas's general disfavor for implied covenants in contracts).

194. *See* Arnold v. Nat'l Cnty. Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987) (discussing Texas tort cause of action for breach of the duty of good faith and fair dealing).

195. *See* Evelyn T. Ailts, Comment, *A New Tort for Texas: Breach of the Duty of Good Faith and Fair Dealing*, 18 ST. MARY'S L.J. 1295, 1308–09 (1987).

196. *See* Arnold v. Nat'l Cnty. Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987) (recognizing that a duty of good faith "may arise as a result of a special relationship between the parties governed or created by a contract" (citing Manges v. Guerra, 673 S.W.2d 180, 183 (Tex. 1984))).

197. *See* Evelyn T. Ailts, Comment, *A New Tort for Texas: Breach of the Duty of Good Faith and Fair Dealing*, 18 ST. MARY'S L.J. 1295, 1308–09 (1987) (reviewing types of relationships that may be deemed "special").

198. *See id.* at 1309 (exploring judicial expansion of tort liability to special, quasi-fiduciary relationships).

199. Saucedo v. Horner, 329 S.W.3d 825 (Tex. App.—El Paso 2010, no pet.).

explained, "A claim for breach of duty of good faith and fair dealing is a tort action that arises from an underlying contract."[200] The court considered the claim of a man who provided landscaping and handyman services for the defendant.[201] In its conclusion, the court explained that the individual qualified as "an independent contractor rather than an employee."[202] The court went on to state, "[the plaintiff] does not argue that a special relationship can exist between an independent contractor and the person who employed him."[203]

Though dicta, the inference follows that an independent contractor could claim the existence of special duties sufficient to warrant the court's consideration.[204] The court would not recognize a special relationship between a homeowner and the individual hired by the homeowner to perform menial tasks.[205] The question remains whether a provider of personnel services would receive the same treatment. Texas employers could argue that they enjoy a special relationship with their recruiting firm vendors based on the reality of their relationship, even though the firms qualify as independent contractors under the right-to-control test.[206] This special relationship thus requires a higher standard of conduct, behavior, and duty than a typical arm's-length transaction—a standard that is transgressed tortiously when trusted recruiters poach their client's employees.[207]

The possibility of legal remedy is not lost, however, even if an employer is unable to persuade a judge that employers and recruiters create a special relationship by the reality of their behavior. Breach of contract claims are still available to enforce any applicable provisions of the parties' contract.[208] If an employer includes confidentiality or non-solicitation provisions in their agreements with recruiting firm-vendors, employee

200. *Id.* at 831 (citing Cole v. Hall, 864 S.W.2d 563, 568 (Tex. App.—Dallas 1993, writ dism'd w.o.j.) (en banc)).

201. *See id.* at 828 (describing the history of the relationship between the plaintiff and defendant).

202. *Id.* at 832.

203. *Id.*

204. *See id.* (hinting that the court may consider a future claim involving a special relationship).

205. *See id.* ("Even assuming for the sake of argument that an employer-employee relationship existed in this case, it is not a special relationship which would give rise to a duty of good faith and fair dealing.").

206. *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (using the amount of control an employer exerts over a worker as a test for determining whether that worker is an employee or an independent contractor).

207. *See, e.g.*, JPMorgan Chase Bank, N.A. v. IDW Grp., LLC, No. 08 Civ. 9116, 2009 WL 321222, at *3 (S.D.N.Y. Feb. 9, 2009) (mem. op.) (asserting two breach of contract claims).

208. *See id.* (attempting to recover on a breach of contract claim).

poaching would likely constitute a breach for which the courts would provide recovery.[209]

Further, the Texas Occupations Code provides some statutory relief.[210] There, the definition of "personnel service"[211] includes companies who offer or advertise as "an executive search or consulting service"[212] and "a personnel consulting service."[213] The statute also includes a list of prohibited practices for those providing personnel services.[214] One provision is especially relevant for employers trying to protect their current employees from poaching:

> An owner, operator, counselor, agent, or employee of a personnel service may not . . . induce, solicit, or attempt to induce or solicit an employee to terminate current employment in order to obtain new employment if the current employment was obtained through that personnel service or a personnel service that has a common ownership with that personnel service unless the employee initiates the new contact.[215]

Though this clearly does not cover every employee-poaching situation, it does provide some protection for injured employers. Candidates placed by a recruiter are off limits to those recruiters.[216] A violation of the code includes civil liability[217] and criminal penalties.[218] These potential consequences should significantly deter Texas recruiting firms from poaching candidates placed by a firm with its client.

VI. DEFENDING AGAINST EMPLOYEE POACHING

Recruitment of employed candidates is an evolving, central facet of the modern business landscape.[219] Companies looking to both fortify their

209. *See id.* at *9–10 (finding that employer's factual allegations regarding a recruiting firm's employee poaching activities supported a breach of contract claim where already addressed in the parties' contract and based upon the same factual predicates).

210. *See* TEX. OCC. CODE ANN. § 2501.201 (West 2011) (defining liability for damages resulting from violations of prohibited personnel services' practices).

211. *Id.* § 2501.001(9).

212. *Id.* § 2501.201.

213. *Id.*

214. *See id.* § 2501.101(enumerating personnel services' prohibited practices).

215. *Id.* § 2501.101(a)(6).

216. Employers might consider using this statute in a "special relationship" argument. Protection of employers from recruiting vendor poaching of candidates placed by the firm arguably demonstrates legislative recognition of the harm employee poaching causes in the context of this unique relationship. *See id.* (placing limits on recruiting services).

217. *See id.* § 2501.101 (explaining that violators are liable for actual damages or treble damages where violation was committed knowingly).

218. *Id.* § 2501.251 (stating the statute's violation results in a Class A misdemeanor).

219. *See* Beesley, *supra* note 160 (characterizing employee poaching as an inevitable norm best

defenses against potential employee poachers and stay out of the courtroom must develop a strategy that simultaneously protects their most valuable assets while maintaining compliance with state[220] and federal[221] anti-trust regulations.[222] These efforts should involve the careful development and monitoring of a company's agreements with its vendor-recruiting firms and include initiatives designed to retain current employees through carefully designed legal strategies and employee development efforts.[223]

First, employers must strategically manage their relationships with executive search firms. Proactive contract drafting is an essential strategy for corporations that utilize multiple recruiting and staffing agencies as part of their talent acquisition process.[224] Most recruiting firms ask their clients to sign recruiting agreements unique to their particular firm.[225] These contracts vary in length, complexity, and terms,[226] underscored by a

overcome by employee retention efforts and strong leadership); *see also* PRICEWATERHOUSECOOPERS, *supra* note 1, at 14 (noting employers' reliance on recruiting directly from competitors).

220. *See* TEX. BUS. & COM. CODE ANN. § 15.05 (West 2012) (defining illegal practices under the state anti-trust regulations).

221. *See* Clayton Antitrust Act of 1914, 15 U.S.C. §§ 12–27 (2012) (establishing unlawful anti-trust practices under federal regulations).

222. Recent attempts by high-tech giants to bring personnel costs down and employee retention numbers up serve as a cautionary tale to navigate this line carefully. *Compare In re* High-Tech Emp. Antitrust Litig., 289 F.R.D. 555, 584 (N.D. Cal. 2013) (affording Plaintiffs leave to amend their complaint in order to satisfy a predominance requirement for class certification in an action against seven high tech corporations accused of conspiring to reduce competition for skilled labor by suppressing employee compensation and mobility), *and* Press Release, U.S. Dep't of Justice, *Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements* (Sept. 24, 2010), *available at* http://www.justice.gov/opa/pr/2010/September/10-at-1076.html (commenting on a settlement between the Department of Justice and six high technology companies who, the department alleged, entered into agreements which diminished competition for attracting top talent and deprived employees of "access to better job opportunities" and "competitively important information"), *with* Julia Love, *Companies Settle Employee 'No-Poaching' Case for $20 Million*, THE RECORDER (Sept. 23, 2013), http://www.law.com/jsp/ca/PubArticleCA.jsp?id=1202620420641&Companies_Settle_Employee_NoPoach_Case_for_20_Million&slreturn=20130908144914 (discussing ongoing antitrust civil litigation in *In re High High-Tech Emp. Antitrust Litig.* in light of ex-employees' $20 million settlement with three of seven high-tech defendants, Intuit Inc., Lucasfilm, and Pixar).

223. *See* Love, *supra* note 222 (scrutinizing agreements that were restrictive to employees).

224. *See* Gregory M. Duhl, *Conscious Ambiguity: Slaying Cerebeus in the Interpretation of Contracts*, 71 U. PITT. L. REV. 71, 74–77 (2009) (understanding the implications of hasty contract drafting).

225. *See* JPMorgan Chase Bank, N.A. v. IDW Grp., LLC, No. 08 Civ. 9116, 2009 WL 321222, at *1–3 (S.D.N.Y. Feb. 9, 2009) (mem. op.) (providing an example of four different agreements).

226. *See* MADISON GRP., FEE AGREEMENT, *available at* http://www.madison-inc.net/pdf/MadisonGroup_FeeAgreement.pdf (exemplifying the appearance of a typical agreement).

common element—the recruiting firm as the drafting party.[227] Though agreements drafted by the recruiting firm may seem convenient and efficient at first glance, employers should be wary of casually entering contracts drafted by recruiters with an eye toward minimizing the search firm's risk while maximizing its return.[228]

As an alternative, employers should draft a single recruiting agreement for use with all prospective vendors.[229] This will streamline the vendor management process, require less input from counsel, and ensure that the employer's interests are protected and risks minimized. In this agreement, employers should carefully define the nature of the parties' relationship and include provisions that protect the company's proprietary information.[230] Recruiting firms will ultimately consent to the use of a standard agreement because they want the corporation's business.

In addition to the strategic management of a corporation's external relationship with recruiting firms, corporations should leverage internal legal strategies to combat the loss of valuable employees.[231] Corporations

227. As an upside, a search firm's agreement will be interpreted against the drafter. *See* RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981) ("In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds."); *see also* Duhl, *supra* note 224, at 95 (discussing *contra proferentem*, a rule of contract interpretation that a facially ambiguous contractual provisions should be interpreted against the drafting party).

228. Executive search firms utilize the concept of conscious ambiguity to draft agreements that protect their interests *enough* without scaring off potential clients. *See* United Rentals, Inc. v. RAM Holdings, Inc., 937 A.2d 810, 845 (Del. Ch. 2007) ("[P]arties often riddle their agreements with a certain amount of ambiguity in order to reach a compromise."); *see also* Duhl, *supra* note 224, at 102 n.175 (2009) (discussing various approaches to deliberate ambiguity in contract law).

229. *See, e.g.*, 2 MODEL AGREEMENTS FOR CORP. COUNSEL § 19:7 (2013) (providing a recruiter retention agreement template).

230. *See* 5AP1 NICHOLS CYCLOPEDIA OF LEGAL FORMS ANNOTATED § 103:10 (2013) (offering practitioners a sample independent contractor agreement that addresses a recruiting firm's agency status, offers sample confidentiality of trade secrets provisions, and includes non-disclosure verbiage).

231. *See* Lindsay & Santon, *supra* note 4, at 73 (suggesting practical methods employers and their attorneys can leverage to curb loss of employees: (1) utilize non-compete agreements, (2) document use of unilateral restrictions designed to discourage poaching from competitors, (3) enter dispute resolution agreements with competitors for resolving claims arising from hiring candidates subject to non-compete agreements, (4) contract with new employees for repayment of training costs in event of firing or resignation during a specified time period, (5) tie sign-on bonus repayment to length of employment in employee retention or term-of-years agreements, and (6) anticipate collaborations which would expose employees to poaching from collaborators); *see also* Nina Kaufman, *Employee Poaching: 5 Essentials for Non-Compete Agreements*, YFS MAG. (Jan. 26, 2013), http://yfsentrepreneur.com/2013/01/26/employee-poaching-5-essentials-for-non-compete-agreements/#axzz2h9nzkMiV (suggesting non-solicitation agreements, confidentiality and non-disclosure agreements, work-for-hire agreements, incentive compensation agreements, and employment manuals are strategic tools companies should utilize to protect their business from

seeking to protect their investment in key employees often choose the legal route and utilize devices such as non-competition and non-solicitation agreements[232] to discourage pivotal professionals from joining the ranks of a competitor. The covenants serve a deterrent function in employee relationship management. The central message is that employees can leave but will not be able to compete directly against the corporation or solicit others to do the same.[233] Though common, these agreements restrain trade and diminish competition.[234] Courts traditionally treat this reality with hostility because they consider restrictive covenants: "(1) deprivations of employees' ability to earn a living, (2) anti-competitive, (3) the result of unequal bargaining power between employers and employees, and (4) contrary to America's general principle of promoting free labor."[235] Despite this presumptive reluctance, restrictive covenants are a critical tool for protecting business from the dangers of losing their valued employees to competitors.[236]

The non-compete agreement is the most prevalent strategy corporations utilize to keep good employees from joining the ranks of a competitor and taking the company's trade secrets along with them.[237] These agreements are, however, the subject of significant litigation,[238] economic debate,[239]

employees who are poached by competitors).

232. *See* Anenson, *supra* note 29, at 17 (commenting on growing prevalence of corporate use of restrictive covenants in order to combat wavering employee retention and maintain competitive advantage); *see also* Lembrich, *supra* note 4, at 2294–97 (discussing employers' utilization of confidentiality agreements, non-competition agreements, and non-solicitation agreements).

233. *See* Anenson, *supra* note 29, at 17 ("The protection of a covenant not to compete provides incentives for companies to invest in both research and their workforce.").

234. *See* Lembrich, *supra* note 4, at 2293 (demonstrating why these covenants are an attractive option).

235. *Id.* at 2297.

236. *See id.* at 2293–94 ("[E]mployers are taking increased steps to protect themselves against the prospect of opportunistic employees absconding with the business' customers and proprietary information.").

237. *See* Anenson, *supra* note 29, at 2 (indicating employer use of post-employment restrictive covenants serves the purpose of keeping confidential corporate information and customer relationships out of competitors' hands).

238. *Compare* Cynthia Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants As a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 381–83 (2006) (noting the complexity of the law regarding covenants not to compete results in frequent litigation), *and* Lembrich, *supra* note 4, at 2294 (tying employers' prevalent use of non-compete agreements and restrictive covenants to increased litigation centering on their enforcement) *with* Anenson, *supra* note 29, at 2 (detailing prosecutorial strategy rooted in equity doctrines wherein companies leverage opposing parties' equivalent post-employment agreements to prohibit a challenge to their enforcement, bolster their validity, or demonstrate a company's hypocrisy as a tool for proving the underlying business tort claim).

239. *See* Estlund, *supra* note 238, at 381 (acknowledging controversy among legal scholars and

and policy concerns.[240] Covenants not to compete also pose significant enforceability issues.[241] They must be limited in duration, scope, and geographic location in order to be enforceable[242]—elements widely contested by employers and employees alike.

Businesses might also consider including non-solicitation provisions in their employee agreements[243] in an effort to limit the capacity of ex-employees going to work for a competitor and then attempting to take their colleagues with them.[244] Not only would these agreements serve as a measure of deterrence against current employees' departure, they would

employment attorneys regarding covenants not to compete).

240. *See* Anenson, *supra* note 29, at 2 (noting post-employment restrictive covenants represent "restraints of trade" which pose public policy concerns). *Compare* Marsh USA Inc. v. Cook, 354 S.W.3d 764, 783 (Tex. 2011) (explaining corporate protectionism does not outweigh "individual or societal interests in a dynamic marketplace"), *and* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 371 (2003) (questioning whether social benefits of non-compete enforcement exceed social costs), *with* Amir & Lobel, *supra* note 50, at 835–36 (discussing non-compete agreements' impact on limiting the employment of the human mind rather than merely the flow of information).

241. *See Marsh USA*, 354 S.W.3d at 788 (representing the philosophy of Texas courts, stating, "Where a naked restraint of trade masquerades as a covenant not to compete, we must strike it down—always"); *see also* Anenson, *supra* note 29, at 12–13 (discussing elements required in a majority of states to enforce non-compete agreements including: (1) restraints no harsher than necessary to protect the employer's interest, (2) absence of undue hardship imposed upon the employee, and (3) lack of injury to the public). *See generally* Norman D. Bishara, *Fifty Ways to Leave Your Employer: Relative Enforcement of Covenants Not to Compete*, 13 U. PA. J. BUS. L. 751 (2011) (comparing states' relative enforceability of non-compete agreements through a "systematic legal analysis-based approach" that incorporates both common law and statutory analysis).

242. *See* Anenson, *supra* note 29, at 12–13 (discussing reasonableness elements required by most states to enforce non-competition agreements).

243. *See* Bob Hepple, *Employee Loyalty in English Law*, 20 COMP. LAB. L. & POL'Y J. 205, 215 (1999) (referring to non-solicitation agreements as "non-poaching" covenants); *see also* Lembrich, *supra* note 4, at 2294 (considering non-solicitation agreements which limit employee's ability to solicit the employer's clients or recruit its employees for a specified period of time upon separation); Warren & Pedowitz, *supra* note 14, at 107–12 (discussing impact of Facebook and LinkedIn activity on an employee's responsibilities under a non-solicitation agreement).

244. *See* Owen Thomas, *Groupon Is Ticked That This Startup Is Poaching Its Salespeople*, BUS. INSIDER (July 26, 2012), http://www.businessinsider.com/groupon-top-hat-monocle-legal-warning-2012-7 (critiquing Groupon's legal warning to educational software startup, Top Hat, which suggested hiring of Groupon employees was "tantamount to contractual interference" and "encouraging current or former Groupon employees to breach their [non-solicitation] agreements"); *see also* Shira Ovide, *Groupon Staff Feel the Heat*, WALL ST. J. (Aug. 13, 2012), http://www.wsj.com/article/SB10000872396390444900304577581661236440948.html (interpreting Groupon attorney's letter to Top Hat, which accused the company of improperly recruiting the corporation's sales force, as a sign of Groupon's internal struggle to retain its core employees); Nicholas Carlson, *New Groupon CEO: Morale Is 'Dramatically Better' Than It Was Under Andrew Mason*, BUS. INSIDER (Aug. 9, 2013), http://www.businessinsider.com/new-groupon-ceo-morale-is-dramatically-better-than-it-was-under-andrew-mason-2013-8 (noting improved employee morale under new Groupon CEO Eric Lefkofsky).

also protect against future employee poaching.

In addition to well-drafted covenants and restrictions, corporations possess another option when managing the employment relationship. Often, it is said that "the best offense is a good defense;" the best defense against employee poaching is arguably a well-executed employee development plan.[245] Strategic employee retention efforts offer employers the chance to secure their workforce proactively from the inside out.[246] Rather than focusing solely on a host of legal strategies to minimize risk, employers also should concentrate on building corporate cultures employees would never dream of leaving.[247]

Employees who are well-compensated, feel respected, and see an opportunity for growth are less likely to jump ship to join the competition.[248] Instead, these engaged individuals will use the knowledge and skills that got them hired in the first place to build a corporate culture other people find attractive and want to join.[249] Employers can then leverage this engagement to transmute employee development efforts into candidate recruitment tactics. Legal devices are crucial components of a firm's risk management plan in minimizing the potential for employee poaching.[250] Employee retention efforts, however, enable corporations to take make strides toward eliminating the problem before it arises.[251]

245. *See* Fraser Hill, *Don't Blame the Headhunters—Get Better at Keeping Your Employees*, ERE (Jan. 29, 2013), http://www.ere.net/2013/01/29/dont-blame-the-headhunters-get-better-at-keeping-your-employees/ (answering critique of recruiter tactics by suggesting corporations develop work environments that current and potential employees find attractive).

246. *See id.* ("The healthy way to deal with the threat of headhunters coming to poach your staff is simply by creating the best possible work environment for your employees.").

247. *See* Minehan, *supra* note 26, at 2 (suggesting employers offer attractive compensation packages, recognize employee contributions, develop a strong management team, and create a great work environment in order to combat employee poaching).

248. *See* PRICEWATERHOUSECOOPERS, *supra* note 1 at 13 (reporting that engaged employees offered 57% greater effort in their jobs and were 87% less likely to resign than their disengaged counterparts).

249. *See id.* (showing empirical evidence of higher retention in companies with an engaging work environment).

250. *See* Gregory M. Saylin & Tyson C. Horrocks, *Employment Covenants: An Ounce of Prevention Is Worth a Pound of Cure*, UTAH B.J., June 2013, at 28, 28 (suggesting periodic review of a corporation's contractual language as a proactive measure to manage the risk of an employment covenant's unenforceability).

251. *See* Minehan, *supra* note 26, at 2 (providing employers with practical solutions to avoid becoming a victim of employee poaching).

VI. CONCLUSION

The goal of this comment is not to berate recruiters for doing their jobs. Filling the gap between supply and demand in the market for top talent is a vital, difficult, nuanced task.[252] From an economic or agency theory perspective, the pay-for-performance model of compensation offers the necessary incentive to align the objectives of the client employer with its vendor-recruiting firm.[253] Problems arise when the most efficient use of a recruiting firm's resources involves targeting one client's employees for placement with a concurrent client.[254]

Damages result from this activity;[255] yet the recruiting firm is not held legally responsible for its role in the injury.[256] This may be because no legal basis exists for extending a search firm's liability outside of a typical breach of contract claim.[257] On the other hand, inadequate exploration of the legal duties a recruiting firm owes to its clients may explain the phenomenon—an inadequacy fueled by the complexity of the inquiry.

Classification of the search firm-client relationship involves the murky intersection[258] of agency, employment, contract, and tort law. Though typically considered an arm's-length transaction, the reality of the recruiting relationship involves something more than the garden-variety transaction.[259] The question then is whether "more" is *special* enough to

252. *See* Bersin, *supra* note 5 (commenting on the enormous complexity and importance of recruitment services).

253. *See* Flannigan, *supra* note 34, at 400 (mentioning economic incentives as a driving force behind employee work ethic).

254. *See* JPMorgan Chase Bank, N.A. v. IDW Grp., LLC, No. 08 Civ. 9116, 2009 WL 321222, at *1 (S.D.N.Y. Feb. 9, 2009) (mem. op.) (presenting a claim that a recruiting firm working concurrently with JPMorgan and their competitor was recruiting JPMorgan employees to work for the competing firm).

255. *See* Suzanne Lucas, *How Much Does It Cost Companies to Lose Employees?*, CBS MONEYWATCH (Nov. 21, 2012, 11:24 AM), http://www.cbsnews.com/news/how-much-does-it-cost-companies-to-lose-employees/ (calculating costs of turnover).

256. *But see* RESTATEMENT (SECOND) OF TORTS § 766 (1979) ("One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the [resulting] pecuniary loss.").

257. *See JPMorgan Chase*, 2009 WL 321222, at *5 (disallowing a claim for a breach of the implied covenant of good faith without an underlying breach of contract claim).

258. Bob E. Lype, *A Murky Intersection between Employment Law and 'Business Torts,'* 38 TENN. B.J. 27, 29–30 (2002) (depicting the convergence of employment, contract, and tort law as a "murky intersection").

259. *See* Evelyn T. Ailts, Comment, *A New Tort for Texas: Breach of the Duty of Good Faith and Fair Dealing*, 18 ST. MARY'S L.J. 1295, 1325–26 (1987) (explaining how the presence of a special relationship can affect a claim).

heighten a recruiting firm's obligations to its client employers—a question that employers, recruiters, and attorneys need answered.