

# When Is an Employee a Fiduciary?

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*This paper provides a discussion and analysis of the situations in which an employee will be found to stand in the position of a fiduciary vis-à-vis his or her employer, and therefore be under an obligation to act solely in the employer's interests. Focusing on the English common law, with comparisons to the Canadian as well as the American and Australian law, the author notes that the employment relationship has not been viewed as inherently fiduciary, even though there is broad acceptance of the principle that an employee owes to the employer duties of trust, confidence and fidelity. However, an employee will be characterized as a fiduciary in two fairly exceptional circumstances: where the employee acts as the employer's agent, or where a fiduciary obligation is implicit in the terms of the employment contract or, alternatively, in the employee's position, powers and responsibilities. With respect to the latter category, some courts have affixed fiduciary responsibility not only where the employee was a de facto director or member of top management, or was otherwise "key" to the enterprise, but also where the employer was said to be "vulnerable" to the employee's misuse of his or her position — an approach which the author criticizes as being too broad in its application to rank-and-file employees. More generally, the author maintains that it is the particular facts underlying an employment relationship, not the existence of the relationship itself, that may give rise to fiduciary duties on the part of the employee, and that even high-level or senior employees should not be considered fiduciaries unless their employment contract or explicitly assigned duties justify such a finding.*

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