EMPLOYMENT ARBITRATION AGREEMENTS

IN THE NON-UNION WORKPLACE :

FAILURE TO MEET MINIMAL STANDARDS OF FAIRNESS?

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I. INTRODUCTION

During the course of the last decade there has been a dramatic increase in the number of compulsory arbitration clauses unilaterally imposed by private sector employers as a condition of employment or continued employment. Such mandatory arbitration agreements are a major source of controversy.[1] Many of the concerns center on issues of fairness and due process for non-union employees in the private sector who do not have the same protections as their unionized and their public sector counterparts. This problem is exacerbated by the important kinds of rights that may be relinquished unwittingly when the employee is pressured to accept the arbitration provision. The employee's rights are protected only when procedural due process is followed by providing an opportunity for a true choice of dispute resolution forums along with full disclosure of the implications of each option. Although the courts have held that, in principle, mandatory arbitration agreements do not violate the doctrines of adhesion and unconscionability, the failure to observe due process could cause the courts to rule that they are unenforceable.

An important legal issue arises with regard to the compulsory nature of private arbitration provisions in employment situations. The issue essentially is whether mandatory pre-dispute agreements to arbitrate all employment disputes are valid. These agreements often are referred to as contracts of "adhesion" because of the inequality of bargaining power between the employer and employee. The employer requires the employee to agree to the arbitration provision as a condition of employment (or continued employment) and the employee is left with little choice if she or he wants the job. Further, the employee's right to have a workplace dispute resolved by a traditional public court is replaced by a private arbitration proceeding.[2] Employers argue that the employee's agreement to arbitrate is voluntary, but can it be voluntary if the employee implicitly was coerced to agree? The implicit coercion arises when the employee's livelihood is interwoven with his or her agreement to the private arbitration provision.[3]

Some have compared the mandatory employment arbitration provisions to "yellow dog contracts" in which the powerless workers "were forced to sell their industrial birthright in order to meet the bare necessities of life."[4] Arbitration, although private in nature, inherently carries with it a change in the rights available to the complainant-employee. These changes include waiving the employee's statutory rights, depriving the employee of his or her right to a jury trial, limiting discovery procedures, reducing the bases for appeal of the arbitrator's decision, and

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[1] *See* Circuit City Stores v. Adams, 69 U.S.L.W. 4195 (U.S. Mar. 21, 2001) (No. 99-1379) and the case now pending before the U.S. Supreme Court on certiorari, Waffle House, 193 F.3d 805 (4th Cir.1999).

[2] One author has defined a contract of adhesion as one not subject to bargaining as to important terms and offered on a take-it-or-leave-it basis. Richard C. Reuben, *No Consent, No ADR,* CAL. LAW, June, 1999, at 44.

[3] *See* Stephen J. Ware, *Employment Arbitration and Voluntary Consent,* 25 HOFSTRA L. REV.83 (1996) for a discussion of this issue.

[4] Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y. U. L. REV 1352 (1997).

negatively affecting the amount of statutory and punitive damages to which the employee may be entitled. The compulsory private employment arbitration provision is being criticized severely and rejected on many fronts.[5]

The authors will explore the controversies surrounding mandatory arbitration, identify where the system falls short of providing appropriate procedural safeguards to ensure fairness and equity, analyze the due process concerns, and offer recommendations for addressing the shortfalls.

II. BACKGROUND

Arbitration in the U.S. can be traced to its eighteenth century use primarily by Dutch settlers in New York and Quakers in Pennsylvania to deal with disputes between merchants. During that same period arbitration was also relied on to handle personal matters, as exemplified by an arbitration clause contained in George Washington's will to resolve any challenges to distribution of his assets.[6]

Arbitration fell into disfavor as the U.S.,[7] influenced by the reluctance to use arbitration in England because of concern by English judges that arbitrators were usurping their powers while lacking the requisite legal training to interpret party rights and responsibilities.[8] In the early 1900s arbitration was resurrected as a method for resolving disputes between business people, thus putting an end to the era in which courts in the U.S. were willing to hear lawsuits brought in clear violation of arbitration agreements.[9]

The hostility toward arbitration dissipated when New York passed the first state arbitration act in 1920 followed closely by the landmark Federal Arbitration Act (FAA) in 1925.[10] The pivotal language supporting arbitration agreements in interstate transactions is found in section 2 of the Act in which it states that arbitration

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[5] The Equal Employment Opportunity Commission (EEOC) issued a policy, Ruling No. 915.022 (July 10, 1997), stating that mandatory arbitration clauses that waive the right of the employee to go to court in discrimination cases are invalid. There were numerous bills before the 106th Congress invalidating mandatory arbitration provisions (Civil Rights Procedures Protection Act, S. 121; Arbitration Choice, H.R. 613; Civil Rights Procedures Protection Act, H.R. 872). *See* S. Pierre Paret*, How Congress Views ADR,* DISP. RESOL. TIMES, Oct.-Dec. 2000, at 3. *See* Ware, *supra* note 3, note 2, at n. 105. The American Arbitration Association has joined with the American Bar Association, the National Academy of Arbitrators, and several other groups in issuing the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship, *available at* http://www.adr.org/rules/employment/protocol.html (last viewed 2/5/01). *See AAA Stresses the Voluntary Use of Employment Arbitration*, DISP. RESOL TIMES., Oct. 1998, at 5,6. The Ninth Circuit in the Duffield v. Robertson Stephens & Co., 144 F. 3d 1182 (9th Cir. 1998), has taken the position that compulsory arbitration agreements cannot be enforced for Title VII claims, although none of the other circuits have agreed with this conclusion.

[6] LUCILLE M. PONTE & THOMAS D. CAVENAGH, ALTERNATIVE DISPUTE RESOLUTION IN BUSINESS 158 (1998).

[7] Alison Brooke Overby, *Arbitrability of Disputes Under the Federal Arbitration Act,* 71 IOWA L. REV. 1137 (1986).

[8] *Id. See* Tobey v. County of Bristsol, 23 F.Cas., 1313 (C.C. Mass. 1845) (No. 14,065).

[9] THOMAS CARBONNEAU, ALTERNATIVE DISPUTE RESOLUTION 105 (1989).

[10] 9 U.S.C. §1-16 (1925). During the congressional debate on the FAA in 1924, Representative Graham of Pennsylvania stated that "This bill is one prepared to answer a great demand for the correction of what seems to be an anachronism in our law, inherited from English jurisprudence. Originally, the English courts refused to enforce agreements to arbitrate, jealous of their own power and because it would oust the jurisdiction of the courts. That has come into our law with the common law from England..." *See* 65 Cong. Rec. 1931 (1924) (Rep.Graham-Pa.)

provisions in a contract are "valid, irrevocable, and enforceable."[11] The Act showed a clear congressional intent to promote arbitration as an alternative to using the traditional court system. Until today the FAA remains the legislative foundation for the federal policy strongly favoring arbitration.[12] This was evidenced as recently as 2001 by the U.S. Supreme Court in its interpretation of the legislative intent of Congress in the FAA with regard to the Act's coverage of employment disputes.[13] Specifically, the issue in the *Circuit City v. Adams* case centered around §1 of the FAA which defines the scope of the Act as applying generally to any transactions involving interstate commerce, but contains a direct exclusion of "contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce."[14] As discussed later in this paper, the U.S. Supreme Court overruled a Ninth Circuit Court decision that held the FAA was not applicable to employment contracts.[15]

III. THE ARBITRATION PROCEDURE

Arbitration is much more informal than the public court process. Arbitration is concerned mainly with a fair and just result, whereas the courts necessarily must consider the policy and precedent implications of their decisions. Arbitration decisions are not based on legal precedent but on the specific merits of the case being heard.

An arbitrator is defined as a neutral third party who renders a decision between two contending parties who cannot mutually arrive at a satisfactory resolution of their conflict.[16] An arbitrator may be employed by a major nonprofit organization devoted to offering arbitration and mediation services such as the American Arbitration Association (AAA), or the arbitrator may operate independently. The case usually will come to the arbitrator as a result of a dispute arising in a contract that has an arbitration provision.

Arbitrators typically are trained and experienced in employment law and abide by a code of ethics and standards.[17] Parties are aware of the background and experience of the arbitrator(s) hearing the case. Before accepting an appointment, arbitrators must sign a disclosure statement in which all information relevant to the standards of neutrality is revealed. They usually are chosen by mutual agreement of the parties.[18]

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[11] 9 U.S.C §2.
[12] CARBONNEAU, *supra* note 9.
[13] Circuit City Stores v. Adams, 69 U.S.L.W. 4195 (U.S. Mar. 21, 2001) (No. 99-1379).
[14] 9 U.S.C. §1 (2001).
[15] Circuit City Stores v. Adams, 194 F.3d 1070 (9th Cir.1999).
[16] DOUGLAS M. MCCABE, CORPORATE NONUNION COMPLAINT PROCEDURES AND SYSTEMS 65 n.14 (1988); Michael R. Holden, *Arbitration of State-Law Claims by Employees: An Argument for Continuing Federal Arbitration Law*, 80 CORNELL L. REV. 1695, 1699 (1995).
[17] Stephanie Armour, *Mandatory Arbitration: A Pill Many are Forced to Swallow*, USA TODAY, Jul. 9, 1998, at 14A.
[18] *Id.*

A. Award

According to the rules of the American Arbitration Association governing employment arbitration,[19] the arbitrator's written award is required to be issued no later than thirty days from the date of the closing of the hearing. The award must provide the written reasons for the award, which is contrary to the requirements in a commercial arbitration in which no reasons need be set forth, unless the parties agree otherwise.[20]

The arbitrator may grant any remedy or relief in the award that he or she deems just and equitable, including any remedy or relief that would have been available to the parties had the matter been heard in court under applicable state and federal law. Attorneys' fees can be included in the award. The arbitrator shall assess arbitration fees, expenses and compensation.[21]

B. Appeals

Judicial review of arbitration decisions is limited. Although an arbitration decision can be appealed, the courts do not review the merits of an arbitrator's decision as would be done when reviewing the decision of a trial court.[22] The Federal Arbitration Act provides only four grounds on which an arbitration may be set aside: 1) the award was the result of corruption, fraud, or other "undue means," e.g., acceptance of a bribe; 2) the arbitrator exhibited bias or corruption; 3) the arbitrator refused to postpone the hearing despite sufficient cause, refused to hear evidence pertinent and material to the dispute, or otherwise acted to substantially prejudice the rights of one of the parties; or 4) the arbitrator exceeded his or her powers or failed to make a mutual, final, and definite award.[23] The first three bases for appeal require proof of the arbitrator's bad faith, something beyond a simple mistake in judgment. This high level of proof is completely different, and much harder to prove, than that required to appeal a judge's decision.

C. Inherent Disadvantages in the Arbitration Process for the Employee

The private arbitration process holds some pitfalls for the employee. The employer probably will have an attorney, so if there is to be representation for the complainant-employee, he or she must bear the cost of an attorney. Many attorneys are reluctant to represent plaintiffs in employment cases. Accepting employment cases on a contingency basis presents a risk that many attorneys do not want to take. Thus, the employee-plaintiff is faced,

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[19] National Rules for the Resolution of Employment Disputes [National Rules 1997], American Arbitration Association, No. 3AAA121-20M-6/96 (1996b).
[20] *Id.* at ¶32.
[21] *Id.*
[22] Theodore St. Antoine, *Deferral to Arbitration and Use of External Law in Arbitration*, 10:2 INDUS. REL. L. J. 19 (1988).
[23] 9 U.S.C. 10(a) (1994).

first, with finding an attorney who will take the case and give adequate representation and, second, with the tremendous costs usually connected with an hourly fee arrangement.

Most employees are unfamiliar with the arbitration system. This unfamiliarity places them at a disadvantage relative to employers who use the system repeatedly. The employer's attorneys are able to use the expertise developed from prior cases while the employee is "breaking new ground." Arbitrators sometimes are hired repeatedly by a company, raising concerns that the arbitrators will side with management to avoid losing exclusive contracts. Thus, the only one who is not a "repeat player" may be the employee-complainant.[24]

The qualifications of the arbitrators present a problem for the employee-complainant if the selected arbitrator does not have the appropriate background in employment law to evaluate the issues presented by the parties intelligently and effectively. The quality and performance of arbitrators has been improved greatly by requirements of some private arbitration bodies for minimum qualifications of the arbitrators as well as for written decisions.

The current insurmountable difficulty for the employee-complainant is the restricted judicial review of the arbitrator's decision if there is an appeal from the decision by the employee. The grounds on which a judge can overturn the award of an arbitrator are very narrow compared to the multitude of "error of law" allegations that may be used to form the basis for overruling a lower court decision by an appellate court.[25]

From a practical standpoint, the single important basis of appeal is on the very narrow grounds that the arbitrator exceeded his or her powers. The possibility of proving fraud, corruption, conflict of interest, or other serious misconduct as a basis for vacating the decision is negligible. There is very little chance that a court will vacate the arbitrator's award in favor of an employer, leaving the employee who has lost an arbitration case on its merits without a realistic chance of winning the case on appeal.

The question that the courts face is whether disputes based on violations of an employee's federal statutory rights can be removed from the jurisdiction of the courts as a result of a private contract that contains an arbitration clause. Most of the anti-discrimination acts that Congress has passed[26] are enforced by the Equal Employment Opportunity Commission (EEOC). In its regulatory capacity of interpreting the anti-discrimination statutes, the EEOC has taken a strong position against the mandatory arbitration of workplace disputes as a condition of

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[24] Lisa Bingham, *Unequal Bargaining Power: An Alternative Account for the Repeat Player Effect in Employment Arbitration,* PROCEEDINGS OF THE FIFTIETH ANNUAL MEETING OF THE INDUSTRIAL RELATIONS RESEARCH ASSOCIATION, Chicago, Ill., Jan. 3-5,1998.

[25] As an example, California only allows an arbitrator's award to be vacated if (a) the award was procured by corruption, fraud, or other undue means, (b) there was corruption in any of the arbitrators, (c) the rights of the party were substantially prejudiced by misconduct of a neutral arbitrator, (d) the arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted, (e) the rights of the party were substantially prejudiced by the refusal of the arbitrator to postpone the hearing upon sufficient cause being shown therefore or by the refusal of the arbitrators to hear evidence material to the controversy, or by other conduct of the arbitrators, or (f) an arbitrator making the award was subject to disqualification because of a conflict of interest. California Arbitration Law, West's Ann. Cal., C.C.P. §§ 1280 - 1288.9.

[26] These laws include Title VII of the Civil Rights Act of 1964, as amended (28 U.S.C. §§1971, 1975a-1975d, 2000a-2000h6), the Age Discrimination in Employment Act (29 U.S.C. §§621-634), and the Americans with Disabilities Act (29 U.S.C. §706, 42 U.S.C. §§12101 et seq., 47 U.S.C. §§152, 221, 225, 611).

employment. Saying that the federal courts have the ultimate authority for enforcing anti-discrimination laws, the Commission concluded that "The use of unilaterally imposed agreements mandating binding arbitration of employment discrimination disputes as a condition of employment harms both the individual civil rights claimant and the public interest in eradicating discrimination."[27]

The private nature of the U.S. system has resulted in serious concerns about its fairness and its attention to due process. The present debate in the U.S. focuses on a number of key issues. First, does private arbitration of employees' statutory rights violate public policy? Second, can employers compel potential and current employees to waive their statutory rights as a condition of employment?

IV. PROTECTIONS SAFEGUARDING PRIVATE AND PUBLIC SECTOR EMPLOYEES

The same statutes do not always govern public sector and private sector employees. The Constitution, some Executive Orders, and the 1991 Civil Rights Act all affect employment arbitration involving public or private sector workers. Similarly, some laws and regulations affect only certain categories of public sector workers (e.g., federal, state, or local government employees). For example, only public sector employees are covered by the U.S. Constitution. The arbitration provisions of Presidential Executive Orders affect employees of federal government agencies. Both public and private sector employees are covered by the 1991 Civil Rights Act.

A. Constitutional Protections

One argument against the use of arbitration in the employment context involves the waiving of constitutional protections. The U.S. Constitution provides a number of protections; two of the most important for this discussion are due process and the right to a jury trial.

The phrase "due process" is found in two amendments to the U.S. Constitution. The due process clause in the Fifth Amendment, which applies to the federal government, reads in part, "No person shall be…deprived of life, liberty, or property, without due process of law…."[28] The due process provision in the Fourteenth Amendment applies only to state governments. This clause reads in part, "…nor shall any State deprive any person of life, liberty, or property, without due process of law...."[29]

Although embodied in the Constitution, the phrase "due process" does not have a precise definition. Due process is a fundamental principle of justice rather than a specific rule of law.[30] One of the most famous and often quoted definitions of "due process of law" was provided by Daniel Webster in his argument in the *Dartmouth*

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[27] EEOC Rule No. 915.002, Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment (1997).
[28] U.S. CONST. amend. V.
[29] U.S. CONST. amend. XIV, §1.
[30] 16 AM. JUR. 2d, *Const. L.* at 545.

College case,[31] in which he declared that by due process of law is meant "the law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial."[32]

Due process involves the administration of laws that apply equally to everyone under established rules that do not violate the fundamental principles of fairness. For example, a person is given notice of the upcoming hearing in accordance with a statute. The notice makes the person aware of the upcoming hearing and the reason for the hearing. Further, the notice affords the person a reasonable opportunity to prepare for the hearing. The conflicting interests in each case are evaluated in a hearing and a competent and impartial party decides the outcome. Due process implies that the review of the case is free of arbitrary or unreasonable action. In criminal cases, each party has the right to a jury trial, the right to be represented by counsel, the right to cross-examine adverse witnesses, and the right to offer testimony on one's own behalf.[33]

The right to a jury is found in the Seventh Amendment. It reads in part, "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.…"[34] Although this Constitutional amendment preserves the right to a trial, that right is available only in a court of law, not in a court of equity.

B. Executive Orders

Three presidents[35] have signed executive orders concerning employment and arbitration. In 1984, President Ronald Reagan signed an executive order that created the President's Advisory Committee on Mediation and Conciliation.[36] The order reads in part:

> The Committee shall advise the President and the Director of the Federal Mediation and Conciliation Service on methods of improving the efficiency of arbitration of disputes arising under collective bargaining agreements, and on other matters, not involving particular labor disputes, of general significance to strengthening and increasing the effectiveness of bilateral dispute resolution mechanisms under such agreements.[37]

In 1991, President George Bush signed an Executive Order on Civil Justice Reform,[38] which was revoked five years later by Bush's successor. Bush's Executive Order cited the tremendous growth in civil litigation and alleged that this growth had burdened the American court system and had imposed high costs on American

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[31] Dartmouth College v. Woodward, (U.S.) 4 Wheat 518, 4 L. Ed. 629.
[32] *Id.*
[33] U.S. CONST. amend. VI.
[34] U.S. CONST. amend. VII.
[35] President Ronald Reagan (1981-1989), President George Bush (1989-1993), and William Clinton (1993-2001).
[36] Exec. Order No.11,462, 49 Fed. Reg. 6,473 (1984).
[37] *Id.*
[38] Exec. Order 12,778, 56 Fed. Reg. 55,195 (1991).

individuals, small businesses, industry, professionals, and government at all levels.[39] The order further stated that some litigation practices added costs by prolonging the resolution of disputes, delaying compensation and encouraging wasteful litigation.[40] *The Guidelines to Promote Just and Efficient Government Civil Litigation,*[41] which are a part of the Executive Order, required federal agencies, among other efforts, "to make reasonable attempts to resolve a dispute."[42] It further required agencies proposing legislation and regulations to make every reasonable effort to determine whether private arbitration was appropriate for enforcement and relief provisions. These provisions were subject to constitutional requirements.[43] Dispute resolution mechanisms also were constrained by the concept of sovereignty. The Executive Order stipulated :

> [Government litigation counsel] shall neither seek nor agree to the use of binding arbitration or any other equivalent ADR technique. A technique is equivalent to binding arbitration if an agency is bound, without exercise of that agency's discretion, to implement the determination arising from the ADR technique. The requirements of this paragraph shall be interpreted in a manner consistent with section 4(b) of the Administrative Dispute Resolution Act, Public Law 101-552, 104 Stat. 2736 (1990). Practice under Tax Court Rule 124 shall be exempt from this provision.[44]

Thus the Executive Order specified that the government acts as sovereign and is not bound by a decision by an outside decision maker.

President's Bush's Executive Order was revoked in 1996, when President Clinton signed another executive order concerning Civil Justice Reform.[45] In many respects the new executive order followed closely its predecessor. The paragraph that requires agencies proposing legislation to determine if private arbitration is appropriate contains identical language.[46] However, the prohibition against government counsel's agreeing to binding arbitration is lifted in Clinton's executive order. In 1997, the Department of Justice issued a memorandum implementing the reforms set out in Clinton's executive order.[47] The memorandum authorizes government counsel to consider binding arbitration, although supervisors must be consulted.

In 1996, Congress permanently reauthorized the Administrative Dispute Resolution Act of 1990.[48] The Act requires agencies to consult with the Attorney General as to when binding arbitration would be appropriate.

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[39] *Id.*
[40] *Id*.
[41] *Id*. at §1.
[42] *Id.* at §1(c).
[43] *Id.* at §2(b)(1)(E).
[44] *Id.* at §1(c)(3).
[45] Exec. Order 12,988, 61 Fed. Reg. 4,729 (1996).
[46] *Id.* at §3(b)(1)(E).
[47] Office of the Attorney General; Memorandum of Guidance on Implementation of the Litigation Reforms of Executive Order No. 12988, DOJ Order No. 2096-97, 62 Fed. Reg. 39,250 (1997); 62 FED. REG. Doc. 97-19,232.
[48] Pub. L. No. 104-320, 110 Stat. 3872.

C. 1991 Civil Rights Act

In 1991, Congress amended Title VII of the Civil Rights Act of 1964[49] to encourage the use of arbitration for resolving employment disputes over statutory civil rights protections[50] against discrimination based on race, color, religion, national origin and sex. The language authorizes the use of arbitration in employment agreements "where appropriate and to the extent authorized by law."[51]

The courts are split in their interpretation of an arbitration agreement. The following three cases discussed involve employees working for firms in the securities industry. Each of the three plaintiffs had signed a Form U-4, the industry's Uniform Application for Securities Industry Registration or Transfer.

The Court of Appeals for the Ninth Circuit found in *Duffield* [52] that the 1991 amendment prohibited employers from imposing predispute mandatory arbitration agreements as a condition of employment. Tonja Duffield brought a lawsuit against her employer, Robertson Stephens & Co., for sexual harassment and discrimination in violation of Title VII and California's Fair Employment and Housing Act. Robertson Stephens brought a motion to compel arbitration on the grounds that Duffield had signed an arbitration agreement for any type of employment dispute.[53] Federal district court granted the motion and Duffield appealed. The Ninth Circuit reversed the decision of the lower court. The court found the U.S. Supreme Court in the *Gilmer* case[54] clearly stated that a court may not enforce an individual agreement to arbitrate statutory claims, i.e., Title VII claims, when "Congress itself has evinced an intention to preclude a waiver of judicial remedies."[55]

In similar cases, the Third and First Circuits came to an opposite conclusion. One month after the *Duffield* decision, the Court of Appeals for the Third Circuit held that predispute agreements to arbitrate claims under the Age Discrimination in Employment Act (ADEA)[56] are valid. Sheila Seus had signed a predispute agreement to arbitrate any employment dispute. Seus sued her employer, John Nuveen, for age discrimination. The court held that Congress' intention in passing the 1991 Civil Rights Act amendments was to encourage arbitration. The court found that a right to a judicial forum was a procedural right, not a substantive one.

In the *Rosenberg* case[57] the Court of Appeals for the First Circuit found that Congress intended to encourage arbitration. Susan Rosenberg sued, alleging age and gender discrimination; Merrill Lynch moved to compel arbitration. The agreement in this particular case was found to be unenforceable, however, because Merrill

[49] Civil Rights Act of 1991, Pub. L. 102-166.
[50] *Id.* at §118.
[51] *Id.*
[52] Duffield v. Robertson Stephens & Co., 144F.3d 1182 (9th Cir. 1998).
[53] *Id.* at 1185-1186.
[54] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).
[55] *Id.* at 1190.
[56] Seus v. John Nuveen & Co., 146 F.3d 175 (3rd Cir. 1998).
[57] Rosenberg v. Merrill Lynch, 163 F.3d 53 (1st Cir. 1998).

Lynch failed to follow the procedures required in Form U-4, namely, it did not provide Rosenberg with a copy of the form.

The U.S. Supreme Court has not yet decided a case concerning the 1991 amendments to the Civil Rights Act that addresses whether pre-dispute agreements alleging discrimination based on statutory protections are valid. The issue is whether employees can prospectively waive their rights to a judicial forum by signing an arbitration agreement. When it encouraged arbitration agreements "where appropriate and to the extent authorized by law" in the 1991 Civil Rights Act, Congress did not clarify its intent. Did Congress intend that mandatory pre-dispute arbitration agreements that waive the employee's right to a judicial forum include only workplace disputes? Or did Congress intend that these arbitration agreements also cover allegations of violations of statutory civil right protections against discrimination? Are mandatory arbitration agreements freely entered into or are they unconscionable contracts of adhesion?

V. CONTRASTING EMPLOYEE PROTECTIONS IN LABOR ARBITRATION AND EMPLOYMENT ARBITRATION

Although this paper is concerned with private employment arbitration in non-union situations, a brief description of the U.S. labor arbitration process is warranted because it serves as the procedural model for the resolution of employment disputes. While the model has been successful in the context of the collective bargaining relationship, some problems have arisen in its transfer to the employment setting. Many of the shortfalls are highlighted by comparisons made between unionized and non-unionized employees: the former enjoy procedural and other protections provided by collective bargaining agreements that individuals lack.

In a collective bargaining relationship, private arbitration is voluntary: the union has represented employees' interests and the parties' agreement to use arbitration precedes any disputes.[58] In contrast, non-unionized individuals do not have third party representation and, generally, they are not covered by a negotiated contract. In fact, employers who use arbitration for the resolution of workplace disputes usually require that individuals accept it as a condition of employment, i.e., it is non-negotiable. Further, employers generally require that all disputes, including those that may arise from alleged illegal discriminatory behavior, be arbitrated. In a unionized environment, the contract language may limit the types of grievances that are arbitrable by the form of the arbitration clause. Broad or general clauses state that all disputes between the parties shall be arbitrated; narrow or restrictive clauses state that only contractual matters may be arbitrated; and exclusionary clauses specifically place certain issues off-limits.[59]

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[58] An arbitration clause typically is negotiated between the employer and the union as a quid pro quo for a non-strike clause; that is, in return for employees' agreement not to go on strike, management agrees to let a neutral third party decide grievances that cannot be resolved at a lower level. *See* DONALD P. ROTHSCHILD, LEROY S. MERRIFIELD & HARRY T. EDWARDS, COLLECTIVE BARGAINING AND LABOR ARBITRATION 284 (1979).

[59] FAIRWEATHER'S PRACTICE AND PROCEDURE IN LABOR ARBITRATION 30-36 (Ray J. Schoonhoven ed., 1991).

The type of clause is important for another reason: in labor arbitration, the authority of the arbitrator is derived from the parties through their contract language. Thus, the function of the labor arbitrator is strictly one of adjudication of the contract.[60] In the employment context, the arbitrator's function is not to interpret the contract. Instead, he or she may be called upon to interpret a federal or state statute that may be beyond the arbitrator's capability.

The collective bargaining agreement generally spells out the procedures to be used to choose the arbitrator, with both sides having input into the choice of arbitrator. The arbitrator is chosen on the basis of his or her knowledge of the "law of the shop" and expertise in the particular industry. In contrast, in employment arbitration the employee may have little or no input into the choice of the arbitrator. Even if the employee does have some decision authority, the question is how well informed he or she is. Another issue concerns the qualifications of the arbitrator. The arbitrator may not be an expert in the area under dispute, such as employment discrimination.[61]

In labor field it is well established that because the parties contractually agree to arbitrate, they are obligated to accept the arbitrator's decision. As a result, the courts have been even more unwilling to overturn an arbitrator's decision in labor cases than in employment cases.[62] In the employment context, most private arbitration agreements are mandatory. Thus, the presumption in labor arbitration that the parties are getting what they agreed to contractually when the arbitrator renders a decision does not hold in the employment context. Yet, employees are bound by the employment arbitrator's decision.

VI. REASONS FOR THE CURRENT CONTROVERSIES IN THE PRIVATE SECTOR

A. Questionable Arbitrability of Statutory Protections

Arbitrability refers to the question of whether a particular issue is subject to arbitration. No question exists that disputes falling under the heading of "terms and conditions of employment" are arbitrable. Examples include disputes related to working hours, benefits, or disciplinary matters, including termination. The major question involving arbitrability in the employment context is whether employees can be required to waive their statutory rights to litigate discrimination claims as a condition of employment. These statutory protections, passed by Congress to further its social policy of deterring discrimination in the workplace, are viewed by many as having an existence separate from non-statutory issues or grievances. Tension arises because the courts have relied on the

[60] FRANK ELKOURI & EDNA A. ELKOURI, HOW ARBITRATION WORKS 110 (1987).
[61] For example, concerns have been raised in the securities industry, where employees sign an agreement to arbitrate all employment disputes as a condition of employment. When disputes arise, the arbitrators who hear the cases have expertise in securities matters but not necessarily in employment law.
[62] United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960).

Supreme Court's interpretation of current arbitration-related laws as representing a Congressional intent to favor labor agreements.[63]

B. Lack of Fairness

A major flaw in the U.S. employment arbitration system is its failure to insure fairness and equity for employees in mandatory private employment arbitration agreements.[64] When employers incorporate private arbitration provisions into employment agreements without fully explaining the legal implications, there is an inherent unfairness for the employee.[65] Further, even when the employee understands the legal ramifications of an arbitration clause, it may be an adhesive situation in which he or she may not be in a position to refuse to agree to the provision because of the effect it may have on a hiring or retention decision. This problem is exacerbated by the important kinds of rights that may be unwittingly (or coercively) relinquished by the employee's acceptance of the arbitration provision: a jury trial, statutory remedies such as punitive damages, the full period provided in statutes of limitations, a full scope of discovery, a full scope of judicial review of the arbitrator's decision, or the right to participate in the selection of the arbitrator.[66] One author has suggested that enforcement of arbitration agreements must be contingent on how the parties reached the agreement as well as in the actual arbitration procedure.[67]

The American Arbitration Association (AAA) has taken a leadership role in developing and implementing due process standards for statutory disputes arising out of the employment relationship.[68] The vast majority of cases hold that the pre-dispute mandatory employment provisions are valid, but there is a growing trend to reject any provisions that deny to the employee his or her basic rights of due process.[69] A California appellate court recently

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[63] Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983); Gilmer v. Interstate Johnson/Lane Corp., 500 U.S. 20, 26 (1991).

[64] This issue arose when the court found that mandatory pre-dispute arbitration provisions are valid under the Federal Arbitration Act in Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc. 473 U.S. 614 (1984) and was further supported in Gilmer v. Interstate/Johnson Lane, 500 U.S. 10, 18 (1991)

[65] Armour, *supra* note 17.

[66] *See* Paul H. Haagen, *New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration,* 40 ARIZ. L. REV1039 (1998).

[67] Susan A. Fitzgibbon, *Teaching Important Contracts Concepts: Teaching Unconscionability through Agreements to Arbitrate Employment Claims*, 44 ST. LOUIS L.J. 1401, 1404 (2000).

[68] Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship, American Arbitration Association (1995). The Association has gone on record as not taking cases in which it is evident that the parties did not agree knowingly and voluntarily to the process. AAA has developed a separate set of Rules for the Resolution of Employment Disputes because it found that the Commercial Rules did not provide adequate safeguards for employees. Under the 1995 employment dispute rules, special qualifications for employment dispute arbitrators and written reasons for decisions are required. The rules were further sharpened by amendments in 1999 in which awards rendered shall be made publicly available on a cost basis and requiring that the arbitrator's compensation be borne equally by the parties unless they agree otherwise or unless the law provides otherwise. NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES, §§ 34, 39, American Arbitration Association, Jan 1, 1999. The "public record amendment" addresses the issue that most arbitration proceedings are conducted off the record, in private settings with no public access, and without the right to a jury trial.

[69] B. J. Palermo, *A Trend and a Warning: Courts are Challenging Arbitration*, NAT'L L. J., at B. 1, Aug. 23, 1999.

rejected the provision in the employment arbitration contract as "unconscionable" because it denied the employee the right of discovery as well as attorney fees and costs.[70]

1. Timing of Arbitration Agreement

The timing of the disclosure of the arbitration clause in an employment contract raises questions of fairness in the surrounding circumstances. Arbitration clauses are presented to the employee in one of two situations, the new-hire stage or the post-hire stage. Both situations occur prior to the existence of any disputes. When a pre-dispute arbitration agreement is signed, many employees are unable to project the magnitude of the problems that may arise in the future and, therefore, do not analyze and reflect upon the consequences of their action. Both the pre-hire and post-hire signing of the arbitration agreement create an inherent problem from the standpoint of the take-it-or-leave-it nature of the presentation. The employee, or prospective employee, is in the vulnerable position of either signing the agreement or risking the loss of his or her opportunity for employment.

a. Pre-hire Agreements

In the pre-hire stage, the contract often is presented in a “take it or leave it” manner. Prospective employees generally are not in a position to negotiate the terms of the arbitration clause, as they want to demonstrate their cooperativeness to their potential employers.[71] Ultimately, the employee is forced to sacrifice his or her statutory rights to sue the employer, should a dispute arise. In this scenario, the employee will sign the agreement containing a mandatory arbitration clause, but there can be no presumption of consent or bargaining power on the part of the employee.[72] The arbitration provision may first be introduced to a prospective employee during negotiations for the job. The employer may address it directly by asking the prospective employee to sign an arbitration provision.

Alternately, the arbitration provision may appear more indirectly in a nonnegotiable Employee Handbook. The Handbook is drafted by the employer and presented to the newly hired employee and becomes part of the contract of employment. Since the Employee Handbook applies to all employees, the clauses contained in it are not negotiated on an individual basis. The employer often does not point out the arbitration clause but, even if highlighted by the employer in some way, the newly hired employee may have little understanding of the real meaning of the clause. The prospective employee focuses on establishing a good relationship, not on challenging

[70] Maciejewski v. Alpha Systems Lab Inc., 99 C.D.O.S. 6312 (1999). Justice Wallin wrote in the opinion that "We perceive a significant trend in the law, both in this jurisdiction and elsewhere, toward a heightened awareness of the potential for unfairness in pre-dispute arbitration clauses."

[71] Katherine Van Wezel Stone, *Labor/Employment Law: Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s,* 73 DENV. U.L. REV. 1017 (1996) at 1040**.**

[72] *Id.* at 1037.

material contained in the Employee Handbook. By his or her acceptance of the Employee Handbook, the new employee agrees to the arbitration provision contained therein.[73]

A variation occurs in a situation in which the prospective employee actually negotiates an employment contract, usually for middle or upper management positions. In this case, arbitration provisions are negotiated in addition to those in the standard Employee Handbook.

b. Post-hire Agreements

In the post-hire stage, the contract to arbitrate all future disputes may be a condition of continued employment. Again, the employee has little bargaining power, as he or she wants to keep her position. The employee is not usually in a position to negotiate the terms of such an agreement. Even when the agreement to arbitrate future disputes is negotiable, the employee risks discrimination when being considered for promotions, raises, or other assignments.[74] In one disconcerting case, a lower court decided to uphold a unilateral mandatory arbitration clause even though the employees had received the notification by mail.[75] Given these factors, it cannot be rightly said that the arbitration contract is a voluntary waiver of one's rights.

In the cases of *Lagatree vs. Luce Forward*[76] and *Hooters of America v. Phillips,*[77] which are discussed in greater detail later in the paper, the employees were presented with arbitration agreements in a post-employment circumstance. In the *Lagatree* case, the employee refused to sign the arbitration agreement presented to him by two consecutive law firm employers, and in both cases he was discharged.[78] In the *Hooters* case, the employee signed the arbitration agreement and resigned after encountering egregious acts of sexual harassment. The employees became embroiled in extensive litigation over the fairness and equity afforded to them in each of their situations.

2. Other Issues Affecting the Validity of the Arbitration Provision

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[73] Courts have held that such an inclusion is valid. David Kinnecome, *Where Procedure Meets Substance: Are Arbitral Procedures A Method of Weakening the Substantive Protections Afforded by Employment Rights Statutes?* 79 B.U.L. Rev. 745, 754 (1999). *See also* Patterson v. Tenet Healthcare, Inc., 113 F.3d 382 (8th Cir 1997).
[74] John Thomas Dunlop & Arnold M. Zack, MANDATORY ARBITRATION OF EMPLOYMENT DISPUTES 97 (1997).
[75] Stone, *supra* note 71 at 1037. *See* Lang v. Burlington Northern Railroad Co., 835 F. Supp. 1104 (D. Minn. 1993).
[76] Lagatree v. Luce Forward, 88 Cal. Rptr. 2d 664 (Ca. App. Ct. 1999).
[77] Hooters of America v. Phillips, 39 F. Supp. 2d 582 (1998), 173 D. 3rd 933 (1999).
[78] In Mr. Lagatree's first experience as a legal secretary for a major law firm in Long Beach, California, he had been employed as a full-time employee for several years when he was asked to sign an arbitration agreement. He had received a series of good job performance ratings and received pay raises and bonuses. He was then asked to sign an arbitration agreement in early June 1997. His refusal to sign the agreement resulted in his discharge on or about June 30, 1997. Mr. Lagatree subsequently was hired in a full-time position as a legal secretary in a prominent Los Angeles law firm on September 12, 1997. On his first official day on the job, September 16, 1997, Mr. Lagatree was given a "Letter of Employment" that confirmed the offer of employment and included an arbitration provision. Mr. Lagatree would not agree to arbitrate disputes, so he was discharged from employment, exemplifying the plight of the employee who chooses not to obey the demands of his employer to agree to forego the court system for an arbitration forum.

All arbitration provisions are grounded in the law of contracts. In fact, an overriding influence on Congress in the passage of the FAA was its desire to enforce agreements into which parties had entered.[79] Thus, the requirements for forming a valid contract must be proven. In order for a valid contract to be formed, there must be a meeting of the minds between the parties with the intent to form a contract with regard to all the essential and material terms of the agreement.[80]

Given the contractual nature of an arbitration agreement, the standard defenses to a contract are available to an employee who is a party to an arbitration agreement but wants the case heard in court rather than in an arbitration setting. Defenses that have some relevance to employment contracts include mistake, fraud, duress, undue influence, and contravention of public policy. Contracts in which the bargaining power of parties is unequal raise the additional defense of adhesion, whereby one party is forcing the other party to "adhere" to the provisions without being able to exercise any choice in the matter[81] and also the defense of the unconscionability of the terms of the contract.[82]

a. Unconscionability of the Agreement

In a recent case, *Hooters of America vs. Phillips,*[83] employees[84] raised the defenses of fraud in the inducement, duress, and the argument of an unconscionable adhesion contract when they asked the court to deny the employer's petition to force the employees to use the arbitration forum as provided for in the agreement.[85] A court may refuse to enforce an unconscionable contract or any part thereof found to be unconscionable. "Unconscionable" conduct, as defined by the courts, involves a situation in which there is an absence of meaningful choice on the part of one of the parties together with contract terms that are unreasonably favorable to the other party. In other words "an unconscionable bargain is one that no man in his sense and not under delusion would make on one hand and . . . no honest and fair man would accept on the other."[86]

A contract of adhesion is generally thought of as a standard form contract offered on a "take-it-or-leave-it" basis, with its terms being nonnegotiable. For an arbitration provision to be stricken as a contract of adhesion, there

[79] Volt Info Sciences v. Leland Stanford Jr. U., 489 U.S. 468, 109 S.Ct. 1248 (1989).
[80] Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (1989).
[81] Because of the involuntary nature of the waiver of rights, mandatory arbitration contracts are sometimes referred to as unilateral contracts of adhesion. Stone, *supra* note 71.
[82] *See* Fitzgibbon, *supra* note 67 for a discussion of the author's use of employment arbitration agreements to teach law students about unconscionabilitiy.
[83] 39 F. Supp. 2d 582 (1998), 173 D. 3rd 933 (1999).
[84] After Ms. Phillips quit her job and refused to arbitrate the dispute, Hooters filed suit in 1996 to compel arbitration. Phillips asserted individual and class counterclaims against Hooters for violations of Title VIII and for a declaration that the arbitration agreements were unenforceable against the class.
[85] The awareness level of courts throughout the country was raised regarding the equity defense of unconscionability when Section 2-302 of the Uniform Commercial Code (UCC) was being considered for adoption by every state. Although the UCC is applicable only to the sale of goods, the provision that extended it from an equity defense to a defense in a court of law caused a greater concentration of interest in the concept.

must be a showing to the court of unfairness, undue oppression or unconscionability.[87] In circumstances in which the employer constructs an arbitration contract and presents it as a condition of employment or continued employment, there can be no presumption of fairness.

The District Court in the *Hooters* case enumerated the following provisions of a post-hire arbitration agreement as unconscionable:

- Required submission to arbitration before a panel selected by the employer;
- Deprived employees of the possibility of full punitive damages;
- Deprived employees of the possibility of compensatory damages;
- Prevented employees from seeking any change in discriminatory practices;
- Subjected employees to payment of Hooters' attorneys' fees;
- Required employees to forfeit their rights to independent determinations of state and federal agencies;
- Restricted employees' rights to discovery unreasonably to one deposition;
- Required employees' witnesses to be sequestered while not imposing the same requirement on Hooters' witnesses;
- Gave Hooters the only right to make a transcript of the proceeding;
- Provided that the employees' remedies were limited to the lesser of what Hooters or the law provided;
- Allowed Hooters to change the arbitration rules at any time and apply them retroactively.[88]

b. Contravention of Public Policy

The Equal Employment Opportunity Commission (EEOC) opposes the settlement of statutory issues in the arbitral forum on the premise that arbitration does not further the public policy goal of eliminating employment discrimination.[89] Public policy considerations have become a focal point for employees' attorneys in arguing the validity of arbitration provisions as it applies to statutory civil rights protections. In past years, the violation of public policy argument became an issue in determining whether employees had a right to sue for wrongful discharge in "at-will" employment situations. Further, employees raised the public policy defense when employers required that their employees sign contracts containing covenants not to compete both during and after employment. The U.S. Supreme Court has cautioned that "there is no broad judicial power to set aside an arbitration award as against

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[86] Hume v. United States, 132 U.S. 406, 411 (1889) quoting Earl of Chesterfield v. Janssen, 28 Eng. Rep. 82, 100 (1750).
[87] Threlkeld & Co. v. Metallgesellschaft, Ltd., 923 F.2d. 245, 248 (2d Cir. 1991).
[88] Hooters of America v. Phillips, 39 F. Supp. 2d 582 (1998).
[89] Adam J. Conti, *ADR Synopsis*, *at* http://www.contilaw.com/adrsyn.html (02/06/2000).

public policy."[90] In the *Hooters* case, however, the court specifically found the entire arbitral agreement and rules void as a matter of public policy.[91]

c. Nondisclosure of Critical Arbitration Provisions by Employer

Disclosure to the employees of the full impact of the arbitration provisions is important to the validity of the agreement. The leading case in this area is the Ninth Circuit decision of *Prudential Ins. Co. v. Lai* in which the court held that Congress intended that there be at least a knowing agreement to arbitrate employment disputes before an employee may be deemed to have waived the comprehensive statutory rights, remedies and procedural protections prescribed in Title VII and related state statutes.[92] There are a number of cases in other jurisdictions to the contrary.

In the *Hooters* case, the employee, Ms. Phillips, claimed that the agreements were neither knowingly nor voluntarily entered into. She based her claims on the manner in which the "roll out" of the new alternative dispute system occurred. Although the employees were given five days during the Thanksgiving holiday to decide whether to sign the arbitration agreements, the detailed explanation of the rights that were being waived were in the Hooters Rules that were referred to in the arbitration agreements but were not made available to the employees. In fact, Phillips contended that the Rules provided the only source of information concerning substantive rights and procedures to be followed in arbitration. The Rules undisputedly were absent from the meeting and perhaps were not even in existence at the time that the employees were asked to sign the agreement.[93]

In order for an employer to prove a valid waiver of statutory rights in the signing of an arbitration agreement, at the very least there must be a knowing and voluntary agreement to each of its critical terms.

d. Waiver of Statutory Rights Versus Waivers of Other Workplace Issues

Included in most employment arbitration provisions are waivers of specific statutory rights in addition to specific waivers of other basic rights inherent in the judicial process, such as the right to a jury trial. In giving up the judicial process as a forum for relief, other requirements often are imposed on employees such as requiring payment of the arbitration fees[94] or shortening the statute of limitations for bringing an action.[95] The arbitration agreement

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[90] United Pipeworker Int"l Union v. Misco, Inc., 484 U.S. 29, 43.

[91] Hooters of America v. Phillips, 39 F. Supp. 2d 582, 616 (1998). The court held the agreement and Rules void because the Hooters arbitral scheme abridged Phillips' rights to full damages and full attorney's fees as allowed by a court under §2000e-5k. In addition, Hooters' arbitral scheme imposed a procedurally unfair forum because the arbitrator had to refer to Hooters' Rules in making a decision, rather than referring to the governing statute.

[92] 42 F. 3d 1299 (9th Cir. 1994).

[93] The employee was relying on an in-house memorandum in which earlier versions of the Rules were referred to as "draft copies."

[94] Unlike a case heard in the judicial system, there are substantial costs of arbitration including the fees of the agency administering the arbitration (e.g., American Arbitration Association) and the fees of the arbitrator. Under the arbitration agreement signed by the plaintiff in one case, there was a requirement for three arbitrators, fees for which

in the *Lagatree* case contains a good example of the application of waivers only with regard to workplace issues. The agreement specifically stated:

> Notwithstanding the above, I understand that I am not required to arbitrate the following claims: discrimination claims, wage and hour claims, and other related statutory claims.[96]

Hooters of America v. Phillips[97] clearly involves allegations by the employees-counterclaimants of a waiver of their statutory rights to bring an action for sexual harassment under Title VII of the Civil Rights Act of 1964.[98] As is evident from the decision in that case by the District Court of Appeals (Fourth Circuit), these types of waivers are extremely troublesome for the courts, particularly when the arbitration agreement removes a substantial number of basic rights provided to the employee by statutory law. Examples of the effect of the arbitration provisions on the basic statutory rights in the *Hooters* case are:

- Hooters' Rules were silent as to compensatory damages that are fully recoverable under the Civil Rights act of 1991;
- Hooters' Rules limited back pay awards by requiring that back pay be reduced by funds received from collateral sources such as unemployment compensation;
- The Rules limited any front pay award to a two-year period;
- The Rules allowed arbitrators to award punitive damages up to a maximum of one year of gross compensation, which is approximately $13,000 compared to the limit of $300,000 in punitive damages for unlawful employment discrimination under the Civil Rights Act;
- The Rules allowed attorneys' fees only upon a showing of frivolity or bad faith of the unsuccessful litigant while Title VII allows attorneys' fees and costs without constraints.

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could easily reach $2000 per day. *See* Maciejewski v. Alpha Systems Lab, Inc., 73 Cal. App. 4th 1372, 1374. However, the First, Third, Fifth, and Seventh Circuits all have held that arbitration agreements requiring employee payment are valid. *See* Bradford v. Rockwell Semiconductor Systems, Inc., No. 99-2201 (4th Cir. 2001) (agreeing with those courts that have applied a case-by-case inquiry as to whether mandatory fee-splitting renders an arbitration agreement unenforceable). *See* also Green Tree Financial Corp. – Alabama v. Randolph, 121 S.Ct. 513 (2000) (Court found that an arbitration agreement's silence on the subject of arbitration costs is insufficient to render it unenforceable).

[95] *Id.*

[96] Lagatree v. Luce Forward, 88 Cal.Reptr.2d 664, 667 (Ca. App. Ct. 1999).

[97] Hooters of America v. Phillips, 39 F. 2d Supp. 582 (1998).

[98] The restaurant employees involved in the action were known as "Hooter Girls" within the company. They alleged that Hooters managers exposed their private parts to female employees, touched them in a sexually predatory manner, forced them to play sexually degrading games to determine to which restaurant area they would be assigned. Also, it was alleged that one manager offered "bounty money" to other managers who would find reasons

- Whereas under Title VII an employer can be enjoined from continuing unlawful conduct, the Rules preclude the arbitration panel from awarding such relief.
- The burden of proof incumbent upon the employees was increased in the Rules to a much higher level than the ordinary "preponderance of evidence."[99]
- The Rules contained language that could be construed as allowing the arbitrators to disregard the law in granting remedial relief.[100]

The California Court of Appeals was faced with the problem of an alleged waiver of the workplace issue of wrongful termination in *Maciejewski v. Alpha Systems Lab., Inc.*[101] Mr. Maciejewski was employed by the defendant as director of computer software development under the terms of a written employment agreement. Maciejewski brought a lawsuit that made a number of claims, including wrongful termination in violation of public policy. He argued that the arbitration provision would deprive him of discovery, and because it was so cost prohibitive,[102] effectively would deprive him of a forum to pursue his claims. The decision of the California Court of Appeals, subsequently upheld without opinion by the California Supreme Court,[103] was that the arbitration was unconscionable. The order of the trial court denying enforcement of the arbitration clause was affirmed.

Consequently, it appears that a judicial pattern of applying the doctrine of combined substantive[104] and procedural[105] unconscionability is emerging when employers impose particularly burdensome waivers in both statutory and workplace pre-dispute arbitration provisions.[106] Ordinarily, the content of the arbitration rules probably would not constitute a material term of the agreement because such rules would address merely procedural matters of the forum. Where there is a waiver of important statutory rights without full knowledge and consent, however, there can be no finding of a valid contract.[107]

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for writing up poor performance for the less attractive female employees in order to eliminate them from the workplace.

[99] Under the provisions of Hooters' Rules, the arbitrator had to consider the company's policies or procedures and management directives in determining whether a violation of Title VII occurred.

[100] Hooters of America v. Phillips, 39 F. Supp. 2d 583 (1998).

[101] 73 Cal. App. 1372; 87 Cal. Rptr. 3d 390 (1999).

[102] The plaintiff argued that it would cost him between $2000 and $7000 merely to file his claim. *See* Maciejewski v. Alpha Systems Lab, Inc., 73 Cal. App. 4th 1372, 1374.

[103] 986 P. 2d 170 (1999).

[104] Substantive unconscionability has been defined as a contract that shocks the conscience or imposes harsh or oppressive terms. Pichly v. Nortech Waste, 86 Cal. Rptr. 2d at 460 (Cal. App. 3 Dist. 1999)

[105] Procedural unconscionability is often determined from the considerations related to contracts of adhesion. The decision of procedural unconscionability rests on whether there was an inequality of bargaining power.

[106] Stirlin v. Supercuts, Inc. 60 Cal Rptr. 2d 138, 51 Cal. App. 4th (1997). *See* 24 Hour Fitness, Inc. v. Superior Court, 66 Cal. App. 4th 1199 (1998), in which the court rejected an unconscionability argument because the arbitration clause balanced the rights and burdens of both the employer and employee.

[107] Hooters of America v. Phillips, 39 F. Supp. 2d 583.

VII. RESPONSES TO PROCEDURAL ISSUES

The procedural issues raised by the use of mandatory employment arbitration have been addressed through a number of channels. Policy statements have been developed and published by a number of organizations in both the public and the private sectors. Judicial decisions have identified specifically some procedural aspects of employment arbitration that the courts find acceptable or unacceptable. Finally, there is legislation pending in the U.S. Congress that addresses mandatory employment arbitration. All three of these responses are discussed below.

A. Policy Statements

1. Dunlop Commission, 1994

In March, 1993, the U.S. Secretaries of Labor and Commerce convened the Committee on the Future of Worker-Management Relations, more commonly known as the "Dunlop Commission" after its chair, John Dunlop.[108] The Committee was charged with answering three questions, one of which relates directly to employment arbitration: "What (if anything) should be done to increase the extent to which work-place problems are directly resolved by the parties themselves, rather than through recourse to state and federal courts and government regulatory bodies?"[109]

Although the Commission's final report strongly encouraged the development of high quality private dispute resolution systems that meet high quality standards for fairness,[110] it specifically took a stand against mandatory employment arbitration. In general, the Committee supported alternative dispute resolution processes that are "inexpensive, fair, and that serve as effective deterrents to unfair behavior by employment practices."[111] Specifically, the Committee proposed six key quality standards that its members believe would allow employees both a fair hearing and a full range of relief.[112] These standards are as follows:

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[108] COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, REPORT AND RECOMMENDATIONS, Dec., 1994.
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*

1. Selection of the arbitrator

   In addition to allowing both parties to participate fully in the selection of the arbitrator, neither party should have the ability to limit the roster unilaterally. The roster should include a significant number of women and minorities. Further, the arbitrators should have training and experience in the area of law under dispute.

2. Procedures

   Because the employees have the burden of proof, they should have the opportunity to gather the information they need to support their legal claims.

3. Payment of the arbitrator

   Both parties should contribute to the arbitrator's fee, although the employee's payment should be in proportion to his/her pay.

4. Awards and remedies

   Employees should have the same remedies available to them as are available through litigation, including the same kind of relief (e.g., reinstatement, back pay).

5. Final arbitrator ruling

   A written opinion that spells out the facts and the reasons for the decision in understandable terms should be provided.

6. Court review

   Judicial review must ensure that the decision reflects an appropriate understanding and interpretation of the relevant legal doctrines.

In addition to these quality standards, the Commission stated its position that binding arbitration agreements should not be enforceable as a condition of employment. If the courts fail to support this position, the Committee members suggested that Congress pass legislation specifying that the method of enforcing statutory rights should be left to the individual involved.[113]

2. Due Process Protocol, 1995

In 1994, a task force comprised of representatives from labor, management, civil rights organizations, private administrative agencies, and the government was convened to examine questions of due process related to

the use of mediation and arbitration for resolving employment disputes. In May, 1995, the task force issued a protocol on arbitral due process: *The Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship* (*Due Process Protocol*).[114] This protocol has been adopted by organizations such as the American Arbitration Association (AAA), the American Bar Association Labor and Employment Section, the American Civil Liberties Union, the Federal Mediation and Conciliation Service, the National Academy of Arbitrators, and the National Society of Professionals in Dispute Resolution.[115]

Although the task force was unable to reach consensus on the timing of an agreement to arbitrate statutory disputes, it did concur that such agreements should be "knowingly made."[116] In addition, the *Due Process Protocol* includes the following recommendations: (a) employees should have the right to choose their own spokesperson; (b) the parties should share the expenses; (c) there should be adequate but limited pre-trial discovery with employee access to relevant information; (d) arbitrators should be neutral and should be chosen from a diverse roster of individuals who have knowledge of the statutory issues at stake; (e) the arbitrator should be empowered to award whatever relief would be available in a court under the law; (f) the scope of review should be limited.[117]

3. Equal Employment Opportunity Commission, 1997

The Equal Employment Opportunity Commission (EEOC) is the federal agency charged with administering many of the employment discrimination laws.[118] Although it has no direct enforcement authority, it can issue interpretations of those laws and write guidelines surrounding their use.[119] In July, 1997, the EEOC stated its firm opposition to mandatory employment arbitration in its *Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment*.[120] The agency reasoned that such agreements are contrary to fundamental principles contained in the anti-discrimination statutes that are based on Constitutional principles. The EEOC relies heavily on several points: (a) the Fourteenth Amendment's guarantee of the right to equal protection; (b) the federal government's responsibility as the ultimate enforcement authority; (c)

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[113] *Id.*
[114] REPORT OF THE TASK FORCE ON ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT (1995) [hereinafter REPORT], *available at* http://www.adr.org/education/education/protocol.html (last viewed 2/4/01).
[115] National Rules (1997), *supra* note 19.
[116] REPORT, *supra* note 114.
[117] *Id.*
[118] Title VII of the Civil Rights Act of 1964, as amended 28 U.S.C. §§1971, 1975a-1975d, 2000a-2000h6. *See* HENRY R. CHEESEMAN, THE LEGAL AND REGULATORY ENVIRONMENT: CONTEMPORARY PERSPECTIVES IN BUSINESS 442 (1997).
[119] JAMES LEDVINKA & VIDA G. SCARPELLO, FEDERAL REGULATION OF PERSONNEL AND HUMAN RESOURCE MANAGEMENT 36 (1991).
[120] EEOC Notice Number 915.002 (7/10/97).

the courts' responsibility for the development and interpretation of the law; and (d) the need for public accountability.[121]

Despite the EEOC's belief that mandatory arbitration systems impede its ability to oversee the enforcement of the employment discrimination statutes, it has found little support for its strong opposition to these systems in the courts.[122] Consequently, the agency has embarked on a "crusade" to change the law by targeting employers who have lawful arbitration agreements.[123]

Specifically, the EEOC devised a strategy to change existing law by challenging employers with mandatory arbitration agreements in judicial forums in which it felt the courts would be most sympathetic to its position. This strategy is spelled out in *Circuit City Stores, Inc. v. Equal Employment Opportunity Commission.*[124] The court's Memorandum Opinion describes the EEOC's strategy by stating that the agency's aims are "(1) to reform what it perceived to be the law created by the decision of the Supreme Court of the United States in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 114 L.Ed. 2d 26, 111 S.Ct. 1647 (1991) and its progeny in the federal courts; and (2) to foreclose the use by employers, in the wake of *Gilmer*, of employment agreements requiring the mandatory arbitration of claims arising under the federal employment discrimination laws enforced by the EEOC."[125]

Toward that end, the EEOC's Office of General Counsel conducted a review of arbitration programs across the country to identify "appropriate litigation vehicles for the purpose of bringing lawsuits aimed at clarifying and reforming the state of the law."[126] Circuit City Stores' mandatory arbitration program (AIRP) was targeted for litigation precisely because it has stores nationwide, providing an opportunity for the EEOC, in its own words, to "strategically select the location of any future lawsuit.... By strategically locating our lawsuit, we hope to increase the likelihood of a split in the circuits and expedite the Court's consideration of this issue."[127]

After selecting the Ninth Circuit as its target venue, EEOC attorneys searched for potential plaintiffs and witnesses in that venue at the same time that it entered into negotiations with a San Francisco law firm to engage in the "joint prosecution of a nation-wide, high profile class case."[128] Agency lawyers also "regularly provided assistance to private counsel for the purpose of bolstering private actions"[129] and apparently "disclosed the anticipated investigation of Circuit City to private counsel before receiving the appropriate approval and before

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[121] *Id.*
[122] See *Equal Employment Opportunity Commission v. Kidder, Peabody & Co., Inc.* 156 F.3d 298, 300-301 (2nd Cir. 1998); *Equal Employment Opportunity Commission v. Frank's Nursery & Crafts, Inc.*, 966 F. Supp. 500, 505 (E.D. Mich. 1997).
[123] S.M. Nelson, *EEOC Sues Employers with Lawful Arbitration Agreements*. 1 J. ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT 21 (1999).
[124] 75 F. Supp. 2d 491 (1999).
[125] *Id*. at 493.
[126] *Id*. at 495.
[127] *Id*. at 496.
[128] *Id*. at 498.
[129] *Id*. at 500.

initiating any communication with the company."[130] Although the court noted that the EEOC's proper role in helping litigants was not an issue before the court, it did state that "the communications are probative evidence of the extent of the EEOC's commitment to foster litigation respecting the legitimacy of Circuit City's AIRP and the ensuing hardship to Circuit City."[131] The court dismissed the case because it lacked jurisdiction; however, it retained jurisdiction to adjudicate Circuit City's motion for sanctions and to assess the propriety of other remedial measures arising out of the EEOC's misrepresentations during the case.[132]

4. Private Sector

A number of private sector organizations have gone on record as criticizing or endorsing certain aspects of employment arbitration agreements. Almost uniformly they oppose the mandatory use of arbitration, especially for the resolution of disputes involving statutory rights. Two of the more prominent points of view are identified and discussed below.

a. AAA National Rules for the Resolution of Employment Disputes

In addition to endorsing the *Due Process Protocol* in 1995, the American Arbitration Association issued its own *National Rules for the Resolution of Employment Disputes* (AAA Rules) the following year. Based on the *Due Process Protocol*, as well as on its own *California Employment Dispute Resolution Rules*, the AAA Rules were developed to provide guidelines for employers and employees looking for a private alternative for resolving their disputes. The AAA Rules were amended in 1997.[133] The AAA will not administer arbitration cases that do not adhere to the guidelines in its AAA Rules and the *Due Process Protocol*.[134]

b. National Academy of Arbitrators

The National Academy of Arbitrators (NAA), a professional organization comprised of labor arbitrators, was involved in drafting the *Due Process Protocol*, which subsequently was endorsed by its members. Its adoption, however, was controversial. Some Academy members are opposed philosophically to employment arbitration, as they fear that individual agreements would not provide the degree of fairness available in the collective agreements in labor arbitration.[135] Others are reluctant to expand the role of the Academy beyond its traditional one of arbitration in the context of collective bargaining agreements.

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[130] *Id.*
[131] *Id.*
[132] *Id*. at 513.
[133] REPORT, *supra* note 114 at 6.
[134] *Id.* at 5
[135] G.W. GRUENBERG, J.M. NAJITA, & D.R. NOLAN (1997). THE NATIONAL ACADEMY OF ARBITRATORS: FIFTY YEARS IN THE WORLD OF WORK 260 (1997).

A third concern is that involvement of NAA members in employment arbitration may lead to perceptions that the Academy supports this practice when, in fact, it may not endorse it.[136] In June, 1993, the NAA Constitution and By-laws were amended to add "employment relations" and "employment-related disputes" to the areas that its members are committed to studying and cooperating with other organizations.[137] In October, 1993, the NAA changed the wording in its Code of Ethics so that it would apply to "employment arbitrations" including, among others, employer promulgated arbitrations and individual employment claims arising pursuant to statute.[138]

B. Judicial Decisions

For the most part, the courts have tended to uphold mandatory employment arbitration agreements. The few that have not done so have taken exception primarily to procedural issues. The notable exception to the general tendency to uphold these agreements is the Ninth Circuit, whose decisions are discussed below. The decisions of the courts that have enforced the agreements are enlightening because they help to identify the boundaries between procedures that protect employees' rights and those that do not.

1. Decisions Refusing to Enforce Mandatory Employment Arbitration Agreements

In a number of cases the courts have refused to enforce mandatory employment arbitration agreements because of one or more procedural issues. In *Prudential Insurance Company v. Lai,*[139] the Ninth Circuit took issue with the fact that the employees did not know that they had waived their right to litigate because the employer "hid" the arbitration agreement in a larger document, misrepresented its content, and failed to give employees time to read the document before signing it. Even if employees know about the clause, there may be reasons why it is unenforceable.

In *Heurtebise v. Reliable Business Computers, Inc*.,[140] the Michigan Supreme Court found that the arbitration agreement contained in the employee handbook was unenforceable because it did not constitute a binding contract and was subject to the employer's unilateral modification.[141] Payment of the arbitrator's fees was at issue in

[136] *Id*. at 282.
[137] *Id*. at 284.
[138] *Id*. at 289.
[139] 42 F.3d 1299 (9th Cir. 1994).
[140] 550 NW 2d 243 (Mich. 1996).
[141] E.P. Kelly (1999). *Ethical and Legal Considerations: Mandatory Arbitration in Nonunion Workplaces,* 1:3 J. OF ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT 46.

Cole v. Burns International Security Services,[142] as the D.C. Circuit conditioned the enforceability of an arbitration agreement on the employer's payment of the costs of the arbitration.[143]

Notably, in neither of these cases did the courts indicate that employers cannot make the acceptance of an agreement to arbitrate a condition of employment.[144] The only case to date in which a court has done so is the Ninth Circuit in *Duffield v. Robertson Stephens*.[145] However, whether the court's decision in this case extends beyond Title VII is questionable, as its reasoning was predicated on its interpretation of the legislative history of that statute.

In *Armendariz v. Foundation Health Psychcare Services, Inc.*,[146] the California Supreme Court found an arbitration agreement unenforceable because its damages limitation was contrary to public policy and it was unconscionably unilateral. In general, however, the Court concluded that employment discrimination claims brought under the California Fair Employment and Housing Act[147] are arbitrable if the arbitration agreement meets certain minimum requirements that permit employees to indicate their statutory rights. These requirements include a neutral arbitrator, adequate discovery, a written decision that is subject to limited judicial review, and limitations on the employees' cost of arbitration.

2. Decisions Enforcing Mandatory Employment Arbitration Agreements

The number of cases in which the courts have enforced mandatory employment arbitration agreements far outweighs those in which they have not. Their reasons provide insight into procedural issues that the courts feel provide adequate protection for employees.

The Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*[148] set the stage for employers' increased use of mandatory employment arbitration to resolve disputes during the past decade. Although the Court left open the question of whether agreements to arbitrate statutory claims are enforceable, it provided a great deal of insight into the procedures that it deems acceptable by identifying specific provisions of the defendant's rules of arbitration that safeguard employees' rights to due process. In fact, the Court found that the New York Stock Exchange (NYSE) rules of arbitration provide adequate protection for employees on all of the grounds on which they were challenged in this case. For example, the Court noted that NYSE rules minimize the potential for arbitrator bias by requiring that both parties be informed of the employment histories of the arbitrators and that they

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[142] 105 F.3d 1465 (D.C. Cir. 1997).
[143] Although the Eleventh Circuit also concluded that high costs of arbitration that may be imposed on an employee provide a legitimate basis for nullifying an arbitration agreement in part (Paladino v. Avnet Computer Technologies, Inc., 134 F. 3d 1054, 1062, 11th Cir. 1998), the First, Third, Fourth, Fifth, and Seventh Circuits have reached a different conclusion. *See* Bradford v. Rockwell Semiconductor Systems, Inc., No. 99-2201 (4th Cir. 2001).
[144] L.L. Maltby, *Private Justice: Employment Arbitration and Civil Rights,* 30 COLUM. HUMAN RIGHTS L. REV. 29 (1998).
[145] 144 F.3d 1182 (9th Cir. 1998).
[146] Cal., No. S075942 (2000).
[147] Gov. Code, §12900 et seq.
[148] 500 U.S. 20 114 L. Ed. 2d 26, 111 S.Ct. 1647 (1991).

be allowed to make inquiries into their backgrounds.[149] In addition, each party is allowed one peremptory challenge and unlimited challenges for cause,[150] and arbitrators are required to disclose any circumstances that would prevent them from being impartial.[151]

The Court was satisfied with the limited discovery provided in arbitration because the NYSE discovery provisions allow for document production, information requests, depositions, and subpoenas.[152] In addition, the Court stated that, in general, the fact that arbitrators are not bound by the rules of evidence provides an effective counterweight to the reduced discovery. By agreeing to arbitrate, an individual trades the extensive procedures available in court for the "simplicity, informality, and expedition of arbitration."[153]

The Court approved of the NYSE rule that requires all arbitration awards to be in writing and to include the names of the parties, a summary of the issues, and a description of the award.[154] It also noted that the award decisions are made available to the public.[155] Finally, the Court stated that arbitrators in general have the power to provide equitable relief, and specifically the NYSE rules do not restrict the types of relief an arbitrator may award. They also provide for collective action. The Court reminded the plaintiff that arbitration agreements do not preclude the EEOC from bringing actions seeking class-wide and equitable relief. Finally, the Court made it very clear that unequal bargaining positions do not render an arbitration agreement unenforceable.[156]

In *24 Hour Fitness, Inc. v. Superior Court*,[157] a case alleging sexual harassment, the court found that the employer's arbitration agreement was enforceable despite challenges on multiple bases. For example, the court did not find the agreement unenforceable on the grounds of unconscionability, as the claimant failed to show the existence of substantive unconscionability.[158] Similarly, the court disagreed that the employer's ability unilaterally to change any provision in its personnel handbook with written notice rendered the arbitration clause illusory, explaining that the employer has a duty to exercise that right fairly and in good faith.[159] The court also found unpersuasive the claimant's argument that conflicting provisions in the personnel manual and the arbitration procedures manual governing the allocation of arbitration costs were indicative of a lack of mutual assent and should render the agreement unenforceable. In rejecting this argument, the court relied on standard rules of contract interpretation, which require discrepancies to be resolved in favor of the employee.[160] Finally, the court found the

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[149] *Id.* at 1654.
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id.* at 1655.
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] 66 Cal.App.4th 1199 (1998).
[158] *Id*. at 1213.
[159] *Id*. at 1214.
[160] *Id*. at 1215; Civ. Code, § 1654.

claimant's argument that she never read the handbook with the arbitration clause despite signing a release saying that she had read it insufficient cause to nullify the arbitration agreement.[161]

An Illinois District Court dismissed a claim that an arbitration agreement added to an employee handbook six years after the plaintiff's initial employment did not constitute sufficient consideration to enforce the arbitration clause. In *Johnson v. Traveler's Property Casualty,*[162] the plaintiff sued for age discrimination following his termination. In response to his allegation that no consideration supported the arbitration provision, the court ruled that the fact that the parties agreed to resolve their disagreements according to the handbook procedures provided sufficient consideration.

A California appeals court found that an employee's discharge for failing to sign pre-dispute mandatory arbitration agreements within days of his hire at two law firms did not violate public policy. In *Lagatree v. Luce, Forward, Hamilton & Scripps*,[163] the court rejected each of the plaintiff's claims. For example, it found that the agreements were not unenforceable on the basis that they were not negotiable, and that the plaintiff's rights to a jury trial and a judicial forum could be waived. Relying on California law, the court determined that arbitration provides sufficient public benefit for upholding employee arbitration clauses. The court also rejected the claim that the costs of pursing a claim violated public policy, saying that the American Arbitration Association's rules allow for reduced fees.

It is interesting to note that less than a month after the California Supreme Court upheld the lower court's decision in the *Lagatree* case, the EEOC filed suit on behalf of the plaintiff in U.S. district court in Los Angeles. That suit alleges that pre-dispute arbitration clauses impermissibly waive rights under federal laws, including the Age Discrimination in Employment Act and the Americans with Disabilities Act. Neither of these statutes has any bearing on this case. The suit charges that the defendant has engaged in retaliation in violation of federal law.[164] It appears that the EEOC may have found the case it has been searching for in its quest to reverse the current law governing employment arbitration, at least at the District Court level. In November, 2000, the U.S. District Court for the Central District of California found in favor of the EEOC's contention that requiring employees to enter into mandatory arbitration agreements is unlawful under federal civil rights laws.[165] Although the Court acknowledged that "a great weight of legal authority" supports the defendant's argument, it noted that the 9th Circuit's holding in *Duffield*[166] that an employer's requiring an employee to sign a pre-dispute mandatory arbitration agreement is unlawful under Title VII was unequivocal. Thus, the District Court concluded that under *Duffield* it was required to issue an injunction prohibiting the defendant from requiring its employees to agree to arbitrate their Title VII claims as a condition of employment and from attempting to enforce any such previously created agreements.

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[161] *Id*.
[162] 56 F.Supp. 2d 1025 (N.D. Ill. 1999).
[163] 88 Cal Rptr. 2d 6643 (Ca App. Ct. 1999).
[164] G.D. Cox, 2/10/00. *Firm Faces Federal Discrimination Suit. Law News Network's Employment Law Center.* Available at <www.lawnewsnetwork.com/stories/A15787-2000Feb9.html), accessed 2/21/00.
[165] EEOC v. Luce, Forward, Hamilton, Scripps LLP, 122 F. Supp 2d 1080 (2000).

3. Review of Recent U.S. Supreme Court Decisions

The legitimacy of arbitration in employment disputes has become a focal point for consideration by the Supreme Court in the last year. The increased reliance of employers on pre-dispute arbitration clauses in employment contracts has become the subject of considerable debate and it was inevitable that the Supreme Court would be asked to render rulings on the issues arising out of these contracts. The *Circuit City v. Adams* case[167] was the last of three arbitration cases heard by the U.S. Supreme Court in 2000-2001 in which the Court consistently supported the arbitration system. In November, 2000, the first of the arbitration cases was heard, *Eastern Associated Coal Corp. v. United Mine Workers of America.* The Justices rejected an employer's argument that a federal court should refuse to enforce an arbitrator's order reinstating an employee who used marijuana because of a strong public policy against drug use by workers in safety-sensitive jobs.[168] This was closely followed by the Court's decision in December, 2000, in *Greentree Financial Corp. v. Randolph* that an agreement to arbitrate in a consumer sales contract is enforceable despite the fact that the agreement was silent on the costs of arbitration.[169]

The most important of the cases in the employment arena is *Circuit City,*[170] in which the U.S. Supreme Court overruled the 9th Circuit Court's decision that §1 of the FAA excludes all employment contracts from the scope of the FAA.[171] In 1997, Mr. Adams sued his former employer, Circuit City in state court alleging employment discrimination, asserting claims under the California Fair Housing and Employment Act.[172] In response, Circuit City filed an action to enjoin the state court action and to compel arbitration under the terms of the arbitration agreement that Mr. Adams had signed when he was employed. When relief was granted to the employer requiring arbitration, Mr. Adams appealed to the U.S. Court of Appeals for the Ninth Circuit which reversed the decision on the grounds that the FAA does not apply to labor or employment contracts.[173] Certiorari was granted and the U.S. Supreme Court heard the case in November, 2000, rendering its decision in favor of the employer in March, 2001.[174] At issue was the interpretation of the FAA's exclusionary language with regard to "contract of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. In the interpretation of the language of the statute, the Court applied the maxim *ejuisdem generis* - whereby the general phrase "engaged in…commerce" would be read in light of the

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[166] Duffield v. Robertson Stephens & Co., 144 F. 3d 1182 (9th Cir. 1998).
[167] Circuit City Stores v. Adams, 69 U.S.L.W. 4195 (U.S. Mar. 21, 2001) (No. 99-1379).
[168] Eastern Associated Coal Corp. v. United Mine Workers of America, (U.S. Nov. 28, 2000), (No. 99-1038).
[169] Greentree Financial Corp. v. Randolph, (U.S. Dec. 11, 2000) (No. 99-1235).
[170] Circuit City Stores v. Adams, 69 U.S.L.W. 4195 (U.S. Mar. 21, 2001) (No. 99-1379).
[171] Circuit City Stores v. Adams, 194 F.3d 1070 (9th Cir.1999). All of the other circuits that considered this issue have held that the FAA does apply to employment cases. *See* Marcia Coyle, *High Court Arbitration Rulings Give Business an Advantage*, NY LAW J., Mar. 29, 2001, at 5.
[172] Cal. Gov't Code §§12900-12996 (2001).
[173] Circuit City Stores v. Adams, 194 F.3d 1070 (9th Cir.1999).
[174] Circuit City Stores v. Adams, 194 F.3d 1070 (9th Cir.1999), cert granted, 120 S. Ct. 2004 (2000).

specific examples which precede it in the statute.[175] Thus, the majority of the Court held that the exclusion was narrowly limited to transportation workers and that the FAA could be invoked to enforce pre-dispute arbitration provisions in employment contracts.[176]

The pattern is well established by five of the nine Justices[177] that the U.S. Supreme Court will uphold the principle that the FAA controls mandatory arbitration agreements between employers and employees. The *Circuit City* case, however, leaves at least two key questions unanswered: whether arbitration clauses can bar class actions and whether clauses must meet the demands of the Seventh Amendment when jury trial rights are waived.[178] These important employment arbitration questions need to be resolved, making it likely that the U.S. Supreme Court will be examining other arbitrability issues in the near future.

C. Legislative Action

In early 1999, legislation was introduced in both Houses of the U.S. Congress that would prohibit the use of mandatory employment arbitration to resolve claims based on unlawful discrimination. Titled the "Civil Rights Procedures Protection Act of 1999," the stated purpose of the bill is "To amend certain Federal civil rights statutes to prevent the involuntary application of arbitration to claims that arise from unlawful employment discrimination based on race, color, religion, sex, national origin, age, or disability, and for other purposes."[179]

The bill's Senate sponsor, Mr. Feingold, described its scope as extending to claims of unlawful discrimination arising under state or local law as well as "other Federal laws that prohibit job discrimination."[180] The House sponsor, Mr. Markey, presented the bill as a means to ensure that employees retain their "right to due process, trial by jury, the appeals process, full discovery, and other 'guaranteed' rights."[181] He did not speak to the fact that individuals who cannot afford an attorney effectively are barred from exercising these rights under the current judicial system. The bill was referred to committee in the respective chambers of Congress, where it remains to date.

At least one state legislature has proposed a bill designed to prohibit mandatory pre-dispute employment arbitration. California Assembly Bill 858 forbids employers to require or request that employees waive their right to

[175] Circuit City Stores v. Adams, 69 U.S.L.W. 4195 (U.S. Mar. 21, 2001) (No. 99-1379). *See* Samuel Estreicher & Kenneth J. Turnbull, *Arbitration Provisions in Employment Contracts,* N.Y. LAW J., April 11, 2001, at 1.
[176] Circuit City Stores v. Adams 69 U.S.L.W. 4195 (U.S. Mar. 21, 2001) (No. 99-1379).
[177] The five Justices forming the majority on the issue of the interpretation of the FAA in *Circuit City* are Justices Kennedy, O'Connor, Scalia, Thomas and Chief Justice Rehnquist. The dissenters are Justices Souter, Stevens, Ginsburg and Breyer.
[178] Marcia Coyle, *Arbitration Heaven Ahead,* NAT'L L. J., April 2, 2001, at B1.
[179] H.R. 872 and S. 121.
[180] CONG. REC., Mr. Feingold, 1/19/99, p. S550.
[181] CONG. REC., Mr. Markey, 2/25/99, p. E287.

access to a judicial forum as a condition of employment or continued employment.[182] Further, the bill provides for a civil penalty of $5,000 per violation.[183]

VIII. RECOMMENDATIONS AND CONCLUSIONS

The concept of due process found in the Fifth and Fourteenth Amendments of the U.S. Constitution legally applies only to the federal and state governments' relationships with their citizens. Over time, however, it has come to be viewed as a value rather than a legal obligation. Thus, even private employees are believed to have the general "right" to due process from their employers.[184]

If private employers abuse the perceived rights of their employees, the government may prohibit by statute the mandatory arbitration of employment disputes, whether the disagreements arise from workplace issues or are based on statutory civil rights protections. The *Hooters* case is a good example of how an employer's overreaching "reasonable" means to protect itself left its employees virtually defenseless. Employers need to pay attention to these rights in order to retain their ability to use employment arbitration without government regulation/interference.

Despite the fact that some employers have established harsh arbitration rules, there are reasons not to preclude employment arbitration clauses. With arbitration, employees who could not otherwise afford to pay an attorney, court costs, and discovery costs, can at least have a hearing before a neutral person. Basically, without money, employees do not have access to the already overcrowded courts. In reality, arbitration may be an employee's only accessible forum. Thus, to abandon arbitration entirely is to ensure that many legitimate claims will not be heard.[185]

The legislature could adopt a compromise, such as the following. Arbitration would be allowed for workplace disputes because awards for these issues do not affect the public policy of civil rights. Statutory civil right protections, however, would be prohibited from being heard in arbitration. These statutory protections were passed by Congress to establish public policy and as such should be heard in a public forum that is subject to review.

The primary question regarding mandatory employment arbitration is whether the employee can waive his or her statutory civil rights protection. To date, the Supreme Court and many lower courts have responded that the arbitration of employment issues does not necessitate a waiver of rights.

The arbitration of employment disputes in the U.S. is at a critical point. Although the U.S. attempted to transfer the labor arbitration model to the employment setting, the result fails to provide the protections taken for granted under the collective bargaining agreements. The increasing popularity of arbitration in the workplace

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[182] A.B. 858 SEC.2. Section 1670.7(a).
[183] A.B. 858 SEC.2. Section 1670.7(c).
[184] D.M. McCabe, 1994, *Alternative Dispute Resolution Mechanisms and Procedural Fairness in Nonunion Employment Disputes.* 1994 PROCEEDINGS OF THE SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION at 152.
[185] Marcela Noemi Siderman, *Compulsory Arbitration Agreements Worth Saving: Reforming Arbitration to Accommodate Title VII Protections*, 47 UCLA L.REV. 1885, 1888 (2000).

indicates a desire to forego the complexity and inconvenience of court litigation. But simplicity and convenience are no substitute for the fundamental rights of due process.

Now that the U.S. Supreme Court has upheld the right to enforce a mandatory arbitration agreement,[186] the next challenge for employers is to preserve employees' fundamental rights of due process and to insure that the terms of the arbitration agreement are fair. As indicated by decisions such as the *Hooters* case, lower courts are concerned about arbitration procedures that do not adequately protect employee rights and remedies.

The inherent value of the arbitration system as a valid ADR mechanism is recognized in the U.S.[187] Now there must be concerted efforts to make these systems fair to employees in order to insure that the full potential of employment arbitration will be realized. The objective is to achieve an equitable system that balances the interests of all stakeholders.

We wish to acknowledge the help of Jane Elizabeth Hallas, Senior Lecturer in Law, Wrexham School of Business, North East Wales Institute, Wrexham, North Wales, U.K.

[186] Circuit City Stores v. Adams, 69 U.S.L.W. 4195 (U.S. Mar. 21, 2001) (No. 99-1379).
[187] *Circuit City,* 69 U.S.L.W. 4195 (U.S. Mar. 21, 2001) (No. 99-1379).