

The Employment Due Process Protocol at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest

RICHARD A. BALES*

I. INTRODUCTION.....	165
II. CREATION	168
A. The Legal Background.....	168
B. The Development of the Employment Protocol.....	171
C. The Content of the Employment Protocol.....	172
III. IMPACT	174
A. Widespread Adoption	174
B. Model for Other Protocols	175
C. Guidance to Employers	176
D. Guidance to Courts	178
IV. TWENTY UNRESOLVED ISSUES	184
A. Contract Formation Issues	185
B. Barriers to Access	187
C. Process Issues.....	189
D. Remedies Issues.....	191
E. FAA Issues	192
F. Conflicts of Interest	193
V. EVOLUTION.....	196

I. INTRODUCTION

In 1995, a task force representing employers, employees, and arbitration service providers drafted A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP (the “Employment Protocol”).¹ This Protocol set minimum procedural safeguards for inclusion in all employment arbitration

* Professor of Law, Salmon P. Chase College of Law, Northern Kentucky University. Special thanks to Wendy Bauer, Christopher Drahozal, Dennis Nolan, Arnold Zack, the participants at the OSJDR 2005 Symposium, and the OSJDR members who organized and edited an exemplary Symposium. Comments are welcome and should be directed to balesr@nku.edu.

¹ See *Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, 9A LAB. REL. REP. (BNA) No. 142, at 534:401 (May 9, 1995) [hereinafter *Employment Protocol*]. The Employment Protocol is reproduced at LAURA J. COOPER ET AL., ADR IN THE WORKPLACE 891–95 (2d ed. 2005).

agreements. For example, participants agreed that employment arbitrators should be qualified to decide statutory disputes, that employees should have a right to counsel in arbitration proceedings, and that arbitrators should be empowered to award the full panoply of damages permitted by law.²

The Employment Protocol has been extremely influential.³ It has been adopted by the major arbitration service providers, members of which will refuse to arbitrate cases under rules inconsistent with the Protocol.⁴ It has inspired two additional Protocols, both adopted in 1998: the Due Process Protocol for Consumer Disputes⁵ (the “Consumer Protocol”) and the Health Care Due Process Protocol⁶ (the “Health Care Protocol”).⁷ The Employment Protocol has provided scrupulous employers with a model for drafting fair, ethical, and enforceable arbitration agreements.⁸ It has guided courts in their decisions of whether to enforce particular employment arbitration agreements.⁹

Nonetheless, the Employment Protocol has been subject to criticism. The drafters themselves announced that they could not agree whether employers should be permitted to require employees to sign pre-dispute agreements to arbitrate statutory employment claims as a condition of employment¹⁰—a critical issue, since the Protocol has become a potent precipitant of these agreements.¹¹ Margaret Harding has pointed out that the absence of monitoring and enforcement provisions may encourage some short-sighted

² *Employment Protocol*, *supra* note 1, §§ B.1, C.5.

³ See generally Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 OHIO ST. J. ON DISP. RESOL. 369 (2004) (discussing the impact of the Employment Protocol).

⁴ See *infra* Part III.A.

⁵ *Due Process Protocol for Consumer Disputes: A Due Process Protocol for the Mediation and Arbitration of Consumer Disputes*, Program Book (Comm’n on Health Care Disp. Resol., ABA Section on Disp. Resol., Wash., D.C.), Apr. 30, 1999, at 43 [hereinafter *Consumer Protocol*].

⁶ *Health Care Due Process Protocol: A Due Process Protocol for Mediation and Arbitration of Health Care Disputes*, Program Book (Comm’n on Health Care Dispute Resolution, ABA Section on Disp. Resol., Wash., D.C.), Apr. 30, 1999, at 1 [hereinafter *Health Care Protocol*].

⁷ See *infra* Part III.B.

⁸ See *infra* Part III.C; cf. Rick Bales & Reagan Burch, *The Future of Employment Arbitration in the Nonunion Sector*, 45 LAB. L.J. 627, 634 (1994) (arguing that employers should “bend over backwards” to draft fair arbitration procedures).

⁹ See *infra* Part III.D.

¹⁰ *Employment Protocol*, *supra* note 1, § A.

¹¹ See Harding, *supra* note 3, at 451 (noting that the drafters’ failure to resolve this issue “allowed the status quo to continue even in the face of significant opposition to the use of pre-dispute arbitration clauses in employment agreements . . .”).

arbitrators to disregard the Protocol and arbitrate cases under lopsided arbitral rules.¹² Katherine Stone has criticized the Protocol as inadequate and skewed in favor of employers.¹³ Leona Green has argued that the Protocol would have been more employee-friendly had the group of drafters been more demographically diverse.¹⁴

A final criticism is that the Protocol, drafted ten years ago in the infancy of employment arbitration, no longer provides the degree of prospective guidance that it once did.¹⁵ Courts now are faced with issues the Protocol's drafters never anticipated. While the Protocol was originally intended as a guidepost for employers rather than the judiciary,¹⁶ it has commendably functioned in both roles. Permitting the Protocol to fade into obsolescence would be a considerable loss.

This article urges the drafters of the original Employment Protocol (and their professional successors) to reconvene to revise and update the Protocol. The article discusses twenty issues that either the Protocol did not address or that might profitably be reconsidered in light of subsequent developments.¹⁷ These twenty issues are grouped into six categories: contract-formation issues, barriers to access, process issues, remedies issues, FAA issues, and conflicts of interest.

This article focuses on one such issue in particular—the issue of how employment arbitrators should handle potential conflicts of interest. The Protocol currently requires only that potential arbitrators “disclose” potential conflicts;¹⁸ if the parties go forward with the arbitration, they are deemed to have “consented” to the conflict. Recent social science literature, however, suggests that this “disclose and consent” approach does not sufficiently protect unsophisticated parties such as pro se employees, and that the Protocol's approach may even exacerbate the conflict.¹⁹ Thus, a disqualification rule may be a more appropriate response to conflicts of interest.

¹² *Id.* at 421–45. See also Kimberlee K. Kovach, *Musings on Idea(l)s in the Ethical Regulation of Mediators*, 21 OHIO ST. J. ON DISP. RESOL. 123 (2005) (discussing the need for mechanisms to enforce ethical standards in mediation).

¹³ Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1045 (1996).

¹⁴ Leona Green, *Mandatory Arbitration of Statutory Employment Disputes: A Public Policy Issue in Need of a Legislative Solution*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 173, 215 (1998).

¹⁵ Harding, *supra* note 3, at 452–55.

¹⁶ See e-mail from Arnold Zack to author (Apr. 4, 2005) (on file with author).

¹⁷ See *infra* Part IV.

¹⁸ *Employment Protocol*, *supra* note 1, § C.4.

¹⁹ See *infra* Part IV.

The Protocol's shortcomings suggest two things. The first is that the Employment Protocol should be revised and updated to provide guidance on the issues currently facing the courts, and to anticipate issues likely to arise in the future. Second, courts should not abdicate their responsibility to ensure fair arbitral processes by refusing to enforce lopsided arbitration agreements.

II. CREATION

I have elsewhere described the legal background of employment arbitration,²⁰ and Margaret Harding has elsewhere described the development of the Employment Protocol,²¹ so I will provide only a short summary of these topics here.

A. *The Legal Background*

Common law courts were hostile to executory arbitration agreements.²² In 1925, Congress responded by enacting the Federal Arbitration Act (FAA),²³ which required courts to enforce arbitration agreements related to commerce and maritime transactions. However, in the 1953 decision of *Wilko v. Swan*,²⁴ the Supreme Court held that an arbitration clause invoked in connection with a fraud claim brought under the Securities Act of 1933²⁵ was void as an invalid waiver of the substantive statutory law. Lower federal courts subsequently interpreted *Wilko* as creating a "public policy" defense to the enforcement of arbitration agreements under the FAA when statutory claims were at issue.²⁶

²⁰ Richard A. Bales, *The Laissez-Faire Arbitration Market and the Need for a Uniform Federal Standard Governing Employment and Consumer Arbitration*, 52 KAN. L. REV. 583, 588–606 (2004).

²¹ Harding, *supra* note 3, at 384–91.

²² See, e.g., *Or. & W. Mortgage Sav. Bank v. Am. Mortgage Co.*, 35 F. 22 (Or. 1888); *Jones v. Harris*, 59 Miss. 214 (1881), *overruled by* *IP Timberlands Operating Co. v. Denmiss Corp.*, 726 So.2d 96, 104 (Miss. 1998); *Allen v. Watson*, 16 Johns. 205, 208–10 (N.Y. Sup. Ct. 1819); *Kill v. Hollister*, (1746) 95 Eng. Rep. 532 (K.B.); *Vynior's Case*, (1609) 77 Eng. Rep. 595 (K.B.).

²³ Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2000) (originally enacted as The United States Arbitration Act, ch. 213, §§ 1–15, 43 Stat. 883–86 (1925)).

²⁴ *Wilko v. Swan*, 346 U.S. 427 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

²⁵ Securities Act, 15 U.S.C. § 77 (2000).

²⁶ See, e.g., *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 827–28 (2d Cir. 1968).

Contractual labor claims, apparently, were different.²⁷ Four years after *Wilko*, the Supreme Court held that federal courts could enforce arbitration clauses contained in labor agreements, though the Court relied on Section 301 of the Labor-Management Relations Act of 1947 (“LMRA”),²⁸ not the FAA, for this holding.²⁹ In the 1960 Steelworkers Trilogy, the Court strongly endorsed the use of arbitration as a mechanism for resolving industrial disputes arising under labor agreements, again relying on the LMRA.³⁰

In 1964, Congress enacted Title VII, which prohibited employment discrimination on the basis of race, color, religion, sex, and national origin.³¹ Subsequent federal statutes extended protection to age,³² pregnancy,³³ and disability.³⁴ State legislatures passed parallel state statutes,³⁵ and state courts began to use contract and tort doctrines to soften the common-law rule of employment-at-will.³⁶ This explosion in employment rights—based on statutory and common-law rights rather than contractual rights conferred by labor agreements—was accompanied by a dramatic increase in litigated employment claims.³⁷

Were these new rights arbitrable? The Supreme Court initially seemed to say no, when it ruled in the 1974 case of *Alexander v. Gardner-Denver Co.*³⁸ that an employee’s arbitration of a just-cause claim under a labor agreement did not foreclose subsequent litigation of a statutory discrimination claim

²⁷ *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). See also Martin H. Malin & Jeanne M. Vonhof, *The Evolving Role of the Labor Arbitrator*, 21 OHIO ST. J. ON DISP. RESOL. 199 (2005) (discussing the judicial development of labor arbitration).

²⁸ Labor Management Relations Act, 29 U.S.C. § 185 (2000).

²⁹ *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 458 (1957).

³⁰ See *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 566–67 (1960); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960); *Warrior & Gulf*, 363 U.S. at 582.

³¹ 42 U.S.C. § 2000e-2 (2000).

³² Age Discrimination in Employment Act, 29 U.S.C. § 621–34 (2000).

³³ Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2000).

³⁴ 42 U.S.C. §§ 12101–213 (2000).

³⁵ R. Bales, *A New Direction for American Labor Law: Individual Autonomy and the Compulsory Arbitration of Individual Employment Rights*, 30 HOU. L. REV. 1863, 1876–77 (1994).

³⁶ *Id.* at 1877–78.

³⁷ See Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7 (1988) (noting that the principal source of worker protection was shifting from contractual rights negotiated through collective bargaining agreements to law-created individual employment rights).

³⁸ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51–53 (1974).

based on the same facts. In that opinion, the Court denigrated arbitration as a forum for resolving statutory employment claims, citing the informality of arbitral procedures, the lack of labor arbitrators' expertise on issues of substantive law, and the absence of written opinions.³⁹ However, in three subsequent cases collectively known as the *Mitsubishi Trilogy*,⁴⁰ the Court overruled *Wilko* and enforced arbitration agreements covering antitrust, securities, and racketeering laws. In doing so, the Court declared that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."⁴¹

The watershed employment arbitration case was the 1991 case of *Gilmer v. Interstate/Johnson Lane Corp.*,⁴² in which the Supreme Court held that the FAA permitted an employer to require a non-union employee to arbitrate rather than litigate a federal age discrimination claim pursuant to a pre-dispute arbitration agreement that the employee had been required to sign as a condition of employment. The *Gilmer* Court quoted with approval the statement in *Mitsubishi* that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits their resolution to an arbitral, rather than a judicial, forum."⁴³ The Court stated that objections of unconscionability and procedural unfairness must be addressed on a case-by-case basis, and that employment arbitration agreements would be enforced absent "the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'"⁴⁴

The *Gilmer* Court's enforcement of the arbitration agreement in that case signaled that the arbitral procedures available there met at least the minimum threshold for preserving the "substantive rights afforded by the [employment discrimination] statute"⁴⁵ and for overcoming contract claims of unconscionability and procedural unfairness. Beyond such a minimum threshold, however, the Court gave little guidance as to when an employment arbitration agreement would be sufficiently egregious to merit non-

³⁹ *Id.* at 56–58.

⁴⁰ *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 479, 486 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 238, 242 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985).

⁴¹ *Mitsubishi*, 473 U.S. at 626–27.

⁴² *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

⁴³ *Id.* at 26 (quoting *Mitsubishi*, 473 U.S. at 628).

⁴⁴ *Id.* at 33 (quoting *Mitsubishi*, 473 U.S. at 627).

⁴⁵ *Id.* at 26 (quoting *Mitsubishi*, 473 U.S. at 628).

enforcement, leaving this to be resolved (often inconsistently)⁴⁶ by the lower courts. The Employment Protocol, at least initially, helped to fill the gap.

B. *The Development of the Employment Protocol*⁴⁷

The Employment Protocol had its genesis in the Dunlop Commission, which was created in 1993 at President Clinton's request to "investigate the current state of worker-management relations in the United States."⁴⁸ In an initial Fact-Finding Report, the Commission found that litigation was a poor enforcement mechanism for statutory employment rights, since the high costs and delay associated with litigation tended to exclude precisely the class of employees that the discrimination statutes were designed to protect.⁴⁹ The Commission cited with approval the labor arbitration process for resolving grievances arising out of collective bargaining agreements.⁵⁰ However, the Commission recognized that labor arbitration was only procedurally fair to certain employees because of the presence of the union in both the negotiation of arbitral agreements and the arbitration process itself; non-union employees, by contrast, typically were presented with an employer-drafted agreement on a take-it-or-leave-it basis, and were responsible for finding their own representation for an arbitral hearing.⁵¹ Procedural protections for non-union employees would have to come from another source.

John Dunlop, Chair of the Commission, asked Arnold Zack, then President of the National Academy of Arbitrators, to draft a list of standards appropriate for arbitration agreements that were drafted by employers for resolving statutory employment claims.⁵² Zack brought the matter to the attention of the American Bar Association's Council of the Labor and Employment Law Section.⁵³ Two members of the Council suggested creating a committee of representatives from organizations "with a stake in

⁴⁶ See Bales, *supra* note 20, at 625–26.

⁴⁷ This section is little more than a summary of Margaret Harding's thorough discussion of the subject. See Harding, *supra* note 3, at 384–401.

⁴⁸ COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FACT-FINDING REPORT xi (May 1994) [hereinafter FACT-FINDING REPORT].

⁴⁹ *Id.* at 112–13. For a more recent discussion of this issue, see Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. REV. 105, 115–17 (2003).

⁵⁰ FACT-FINDING REPORT, *supra* note 48, at 122.

⁵¹ See *id.* at 115, 118.

⁵² Arnold M. Zack, *The Evolution of the Employment Protocol*, DISP. RESOL. J., Oct.–Dec. 1995, at 36.

⁵³ JOHN T. DUNLOP & ARNOLD M. ZACK, *MEDIATION AND ARBITRATION OF EMPLOYMENT DISPUTES* xviii (1997).

fair due process.”⁵⁴ Shortly thereafter, Zack initiated a Task Force on Alternative Dispute Resolution, composed of representatives from the American Bar Association, the Society of Professionals in Dispute Resolution, the National Academy of Arbitrators, the Federal Mediation and Conciliation Service, the National Employment Lawyers’ Association, the American Civil Liberties Union, and the International Ladies Garment Workers’ Union.⁵⁵ This Task Force began its work in September 1994, and released the Employment Protocol in May 1995.⁵⁶

C. *The Content of the Employment Protocol*

The Employment Protocol has four parts. In the first part, the Protocol expressly declines to take a position on the issue of whether employers should be permitted to require employees to sign pre-dispute agreements to arbitrate statutory employment claims as a condition of employment,⁵⁷ and instead merely lists the “spectrum” of opinion on the issue. This is a major weakness of the Protocol, since one purpose of the Protocol was to encourage employment arbitration,⁵⁸ and since the Protocol has in fact accomplished this result.⁵⁹

The second part of the Employment Protocol provides that employees “have a right to be represented by a spokesperson of their own choosing,” and encourages employers to pay for at least some of these fees.⁶⁰ While recognizing that discovery is more limited in arbitration than in litigation, this part of the Protocol nonetheless provides that “employees should have access to all information reasonably relevant to . . . their claims.”⁶¹ It recommends that, prior to the selection of an arbitrator, each party should be provided with sufficient information to contact the representative of the parties in the prospective arbitrator’s six most recent cases.⁶²

The third part of the Employment Protocol describes arbitrator qualifications, selection, and authority. Arbitrators should have adequate training,⁶³ “skill in the conduct of hearings, knowledge of the statutory issues

⁵⁴ Zack, *supra* note 52, at 36.

⁵⁵ DUNLOP & ZACK, *supra* note 53, at xiv.

⁵⁶ *Id.* at xiv, 45.

⁵⁷ *Employment Protocol*, *supra* note 1, § A.

⁵⁸ *Id.* § “Genesis.”

⁵⁹ *See infra* Part III.A.

⁶⁰ *Employment Protocol*, *supra* note 1, § B.1, B.2.

⁶¹ *Id.* § B.3.

⁶² *Id.*

⁶³ *Id.* § C.2.

at stake in the dispute, and familiarity with the workplace and employment environment.”⁶⁴ A roster of arbitrators “should be established on a non-discriminatory basis, diverse by gender, ethnicity, background, and experience.”⁶⁵ Both parties should participate in arbitral selection, or should delegate that authority to an arbitration service provider.⁶⁶ The arbitrator “must be independent of bias toward any party,”⁶⁷ and must “disclose any relationship which might reasonably constitute or be perceived as a conflict of interest.”⁶⁸ The arbitrator should have the authority to resolve issues arising in the arbitration, and to award “whatever relief would be available in court under the law.”⁶⁹ Cost-sharing is recommended unless one party cannot afford it, in which case the parties are encouraged to agree to a cost-sharing arrangement.⁷⁰ If the parties are unable to do so, the arbitrator should determine the allocation of fees.⁷¹

The fourth part of the Employment Protocol provides that the “arbitrator’s award should be final and binding and the scope of review should be limited.”⁷²

The Employment Protocol was designed to provide access to a dispute resolution forum to employees who, because of cost and delay, have effectively been denied access to any meaningful judicial or administrative forum.⁷³ It also was designed to help create a “level playing field” for employees and employers.⁷⁴ Consistent with this goal, the Employment

⁶⁴ *Id.* § C.1.

⁶⁵ *Id.*

⁶⁶ *Id.* § C.3.

⁶⁷ *Id.* § C.1.

⁶⁸ *Id.* § C.4.

⁶⁹ *Id.* § C.5.

⁷⁰ *Id.* § C.6.

⁷¹ *Id.* An empirical study of American Arbitration Association employment arbitration found that AAA employment arbitrators exercised their discretion to reallocate arbitrator’s fees to the employer in 70.25% of the cases, hearing fees in 71.3% of the cases, and some or all of the filing fees in 85.12% of the cases. Even when employees lost on the merits, the arbitrator nonetheless shifted some or all of the employee’s share of these fees to the employer in approximately 65% of the cases. Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 812 (2003).

⁷² *Employment Protocol*, *supra* note 1, § A.

⁷³ *Id.* § at Genesis.

⁷⁴ *Id.* (encouraging arbitration that is “fair” and that contains “due process safeguards”); *see also* Harding, *supra* note 3, at 401 (noting that “[e]ach of the provisions

Protocol instructs arbitrators to “reject cases if they believe the procedure [in a particular arbitration case] lacks requisite due process.”⁷⁵

III. IMPACT

The Employment Protocol has been extremely influential in a variety of ways. First, it has been adopted by the major arbitration service providers. Second, it has inspired the Consumer Protocol and the Health Care Protocol, both adopted in 1998. Third, it has provided scrupulous employers with a model for drafting fair and enforceable arbitration agreements. Fourth, it has guided courts in their decisions of whether to enforce particular employment arbitration agreements.

A. Widespread Adoption

Both the American Arbitration Association (AAA) and the Judicial Arbitration and Mediation Service have endorsed the Employment Protocol, incorporated the principles of the Protocol into their own arbitration rules, and have agreed to administer only employment arbitrations that are conducted consistently with the Protocol.⁷⁶ Most other arbitration service providers have taken similar steps.⁷⁷ Many independent arbitrators have likely done so as well. The adherence of arbitrators and arbitral service providers to the Protocol helps protect employees from lopsided arbitral procedures in two ways. First, it encourages employers to draft fair procedures as a means of ensuring a ready supply of arbitrators (and therefore a workable non-judicial dispute resolution system). Second, an arbitrator’s or arbitration service provider’s refusal to arbitrate under a set of arbitral rules is powerful evidence in a judicial proceeding to determine whether an arbitration agreement is enforceable.⁷⁸

of the Employment Protocol were designed to help create a level procedural playing field between the disputants and to give disputants an equal opportunity to be heard.”).

⁷⁵ *Employment Protocol*, *supra* note 1, § C.1.

⁷⁶ *Harding*, *supra* note 3, at 403–04. *See also* *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 941 (4th Cir. 1999) (citing the testimony of several arbitrators and arbitral service providers as a basis for the court’s finding that the employer-promulgated arbitral procedures were “warped” and “skewed” in the employers’ favor).

⁷⁷ *Harding*, *supra* note 3, at 404 & n.196.

⁷⁸ *See Hooters*, 173 F.3d at 941; *see also* *Martinez v. Master Protection Corp.*, 12 Cal. Rptr. 3d 663, 672 n.5 (Cal. Ct. App. 2004) (holding that arbitration agreement was unconscionable, and noting that AAA had refused to arbitrate the case because the arbitral rules were contrary to the Employment Protocol).

B. Model for Other Protocols

The Employment Protocol inspired the Consumer Protocol and the Health Care Protocol. In 1997, AAA convened a National Consumer Disputes Advisory Committee to “advise the [AAA] in the development of standards and procedures for the equitable resolution of consumer disputes.”⁷⁹ This Advisory Committee drafted the Consumer Protocol, which was signed in April 1998⁸⁰ and adopted by AAA later that same year.⁸¹

The Consumer Protocol contains fifteen guiding principles, many of which provide consumers with more protection than the Employment Protocol provided employees. For example, the Consumer Protocol requires that the ADR program be independent of the parties,⁸² a requirement not found in the Employment Protocol. Similarly, the Consumer Protocol does more to ensure that signatories have “knowing, informed assent”⁸³: it requires that consumers be given “clear and adequate notice of the arbitration provision and its consequences”⁸⁴ as well as access to information regarding the arbitration process, including costs.⁸⁵ Like the Employment Protocol, however, the Consumer Protocol does not prohibit predispute arbitration agreements.

The Health Care Protocol apparently had its genesis when the California Supreme Court criticized Kaiser Permanente’s administration of its arbitration program.⁸⁶ This criticism prompted the creation of the Commission on Health Care Dispute Resolution, which was comprised of representatives of AAA, the American Bar Association, and the American Medical Association.⁸⁷ The Health Care Protocol contains ten guiding

⁷⁹ *Consumer Protocol*, *supra* note 5, Introduction: Genesis of the Advisory Committee.

⁸⁰ *Id.*

⁸¹ Thomas J. Stipanowich, *Resolving Consumer Disputes*, DISP. RESOL. J., Aug. 1998, at 13.

⁸² *Consumer Protocol*, *supra* note 5, at Principle 3: Independent and Impartial Neutral; Independent Administration.

⁸³ *Id.* at Principle 11: Agreements to Arbitrate, Reporter’s Comments.

⁸⁴ *Id.*

⁸⁵ *Id.* at Principle 2: Access to Information Regarding ADR Program, Reporter’s Comments.

⁸⁶ Margaret A. Jacobs, *American Arbitration Association to Change Policy on Health Care*, WALL ST. J., July 1, 1998, at B5, *cited in* Harding, *supra* note 3, at 407 n.219.

⁸⁷ Commission on Health Care Dispute Resolution, Final Report (July 27, 1998), at 3–4.

principles, similar to those of the Employment and Consumer Protocols.⁸⁸ Unlike those Protocols, however, the Health Care Protocol bans the use of predispute arbitration agreements, permitting patients to agree to arbitration only after a dispute has arisen.⁸⁹ The Health Care Protocol was signed in 1998,⁹⁰ endorsed by the ABA in 1999,⁹¹ and adopted by AAA in 2003.⁹²

C. Guidance to Employers

Perhaps the most under-appreciated influence the Employment Protocol has had has been in providing guidance to scrupulous employers (and their attorneys) who wish to draft fair and enforceable arbitration agreements. The law reporters are full of cases in which employees have challenged arbitration agreements that the employees believed were unfair. This is not, however, a representative sample of employment arbitration cases, because it obviously does not reflect cases in which the employee happily arbitrated her claim and was satisfied with the process and outcome (but nor does it include cases in which the employee, without the resources to challenge a lopsided agreement, simply gave up on her claim).⁹³ Richard Ross, Senior Associate General Counsel for Anheuser-Busch, has explained that it is in an employer's self-interest to create a fair arbitration system that employees trust:

The enforceability of these programs will always be an issue. My philosophy on that is first, you cannot play games with these programs. If you try to use an employment ADR program to limit legal exposure or employee rights or remedies, you are going to get shot down. Second, no matter how fair and reasonable the program, there will always be some risk that a particular court will not enforce it.

Besides, the true key to a good employment ADR program is not legal enforceability. The key to a good program is whether it has sufficient credibility in the eyes of the employees that they willingly use it. If you can

⁸⁸ *Health Care Protocol*, *supra* note 6.

⁸⁹ *Id.* at Principle 3: Knowing and Voluntary Agreement to Use ADR.

⁹⁰ *Health Care Protocol*, *supra* note 6.

⁹¹ William K. Slate, *ADR and the Health Care Challenge*, DISP. RESOL. J., Aug. 1999, at 1.

⁹² Harding, *supra* note 3, at 409 n.227.

⁹³ *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 662 (6th Cir. 2003) (en banc) ("If we do not know who will prevail on the ultimate cost-splitting question until the end, we know who has lost from the beginning: those whom the cost-splitting provision deterred from initiating their claims at all.").

get your program to that level, you don't have to worry about enforceability.⁹⁴

Similarly, Martin Malin has explained that an attorney drafting an employment arbitration agreement on behalf of an employer may be under an ethical obligation to draft a fair agreement.⁹⁵

Recent empirical research demonstrates that when employment arbitration is conducted under fair rules (such as AAA's rules, which follow the Employment Protocol), employees fare at least as well, and in many respects better, than they do in litigation.⁹⁶ For several years after its adoption, the Employment Protocol served as a blueprint—or at least an adequate starting point—for employers who wished to create a fair employment arbitration system. But recently, legal issues have arisen in the courts which were not resolved, or not considered, by the Task Force that drafted the Employment Protocol. The Employment Protocol cannot function as an adequate guide to employers if it does not address many of the critical legal issues that employers must resolve when they draft their arbitration systems. And, of course, some unenlightened employers continue to promulgate intentionally lopsided agreements,⁹⁷ illustrating a continuing

⁹⁴ RICHARD ROSS, CPR INSTITUTE FOR DISPUTE RESOLUTION, *HOW COMPANIES MANAGE EMPLOYMENT DISPUTES: A COMPENDIUM OF LEADING CORPORATE EMPLOYMENT PROGRAMS* 55 (2002).

⁹⁵ Martin H. Malin, *Ethical Concerns in Drafting Employment Arbitration Agreements After Circuit City and Green Tree*, 41 BRANDEIS L.J. 779, 780 (2003). Martin Malin describes norms, such as the burden of proof in labor arbitration cases, that labor arbitrators have internalized (and which they apply consistently) despite the absence of any source of authority requiring that they do so. Malin & Vonhof, *supra* note 27. Professor Malin's BRANDEIS L.J. article argues that attorneys drafting employment arbitration agreements have an ethical obligation to make such agreements fair, but he does not address the obligations of other arbitral participants. For example, one could argue that if an employer asks an attorney to represent the employer in an arbitration governed by lopsided arbitral rules, the attorney would be under an ethical obligation to refuse the representation. The employer representative obviously would not be subject to the ethical rules governing attorneys, but might be under a moral obligation to adopt a fair agreement, and one would hope that the adoption of fair agreements generally becomes a customary practice. An attorney-arbitrator should probably be held to an ethical standard even higher than the attorney-drafter (since the arbitrator's duty of neutrality obviates any duty to vigorously represent a particular party), but a non-attorney-arbitrator's ethical duty will derive exclusively from the rules of the arbitration service provider, of which there will be none if the arbitrator is independent.

⁹⁶ Maltby, *supra* note 49, at 114.

⁹⁷ See, e.g., *Morrison v. Circuit City Stores*, 317 F.3d 646, 655 (6th Cir. 2003) (en banc) (employer imposed a one-year cap on back pay, a two-year cap on front pay, and a \$5000 cap on punitive damages in most cases); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d

need for judicial supervision of employment arbitration and for an adequate source of guidance to judges.

D. Guidance to Courts

The Employment, Consumer, and Health Care Protocols have been widely cited by federal and state courts. For example, in the consumer arbitration case of *Green Tree Financial Corp.-Alabama v. Randolph*,⁹⁸ Justice Ginsberg, dissenting, noted that the arbitration agreement at issue there “provide[d] no indication of the rules under which arbitration will proceed or the costs a consumer is likely to incur in arbitration.”⁹⁹ Green Tree, the drafter of the agreement, was a “repeat player” in consumer arbitration and therefore had “superior information about the cost to consumers of pursuing arbitration.”¹⁰⁰ Green Tree could have, but did not, draft fair cost-allocation rules, such as “by specifying . . . that arbitration would be governed by” AAA’s Consumer Arbitration Rules,¹⁰¹ which had been modeled on the Consumer Protocol.¹⁰² In a footnote, Justice Ginsberg listed the Consumer Protocol as an exemplary model “for fair cost and fee allocation.”¹⁰³ Green Tree’s failure to draft such rules made it “hardly clear that [the consumer] should bear the burden of demonstrating up front the arbitral forum’s inaccessibility, or that [the consumer] should be required to submit to arbitration without knowing how much it w[ould] cost her.”¹⁰⁴

Similarly, in *Cole v. Burns International Security Services*,¹⁰⁵ Chief Judge Harry Edwards approvingly cited the Employment Protocol both as support for the court’s holding that extra-contractual safeguards were

1165, 1175-77 (9th Cir. 2003) (employer imposed a statute of limitations much shorter than the limitations period imposed by law, prohibited class actions, and required employees to pay a “filing fee” directly to the employer as a prerequisite for bringing a claim); *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 786 (9th Cir. 2002) (employer limited depositions of employer representatives, but not depositions of plaintiff-employees, to “no more than four designated subjects”); *Prevot v. Phillips Petroleum Co.*, 133 F. Supp. 2d 937, 940 (S.D. Tex. 2001) (employer gave arbitration agreements—written in English—to Spanish-speaking employees, and pressured the employees to sign the agreements immediately).

⁹⁸ *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000).

⁹⁹ *Id.* at 94–95.

¹⁰⁰ *Id.* at 96.

¹⁰¹ *Id.* at 95.

¹⁰² *Harding*, *supra* note 3, at 412.

¹⁰³ *Green Tree*, 531 U.S. at 95 n.2 (Ginsberg, J., dissenting).

¹⁰⁴ *Id.* at 96.

¹⁰⁵ *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997).

necessary to ensure the vindication of statutory employment rights, and as a source of such procedural safeguards.¹⁰⁶ However, the court disagreed with the Employment Protocol's cost-sharing recommendation,¹⁰⁷ and instead enforced the arbitration agreement at issue only because the court interpreted it as requiring the employer to pay the arbitrator's entire fee.¹⁰⁸

Courts often cite to an arbitration rule's consistency with the Protocols as evidence that the rule is fair and enforceable. For example, in *Wyatt, V.I., Inc. v. Hovensa, L.L.C.*,¹⁰⁹ an employer sought a declaratory judgment

¹⁰⁶ *Id.* at 1485 n.16.

¹⁰⁷ *Id.* at 1483 n.11.

¹⁰⁸ *Id.* at 1485–86. Prior to *Cole*, the prevailing view of legal commentators seemed to be that sharing the cost of the arbitrator was an essential term of an enforceable arbitration agreement, on the theory that arbitrators might be perceived as biased if they were paid solely by employers. *See, e.g.*, Shalu Tandon Buckley, *Practical Concerns Regarding the Arbitration of Statutory Employment Claims*, 11 OHIO ST. J. ON DISP. RESOL. 149, 179–80 (1996); Reginald Alleyne, *Arbitrators' Fees: The Dagger in the Heart of Mandatory Arbitration for Statutory Discrimination Claims*, 6 U. PA. J. LAB. & EMP. L. 1, 38–40 (2003). This was the approach taken by the Employment Protocol. After *Cole*, but before *Green Tree*, the judicial pendulum seemed to shift; many courts concluded that employee access to the dispute resolution forum is a more important concern, and that arbitration agreements that require employees to pay a significant part of the arbitrator's fees were unenforceable. *See, e.g.*, *Shankle v. B–G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1234–35 (10th Cir. 1999) (refusing to enforce arbitration agreement that required employee to pay for one-half of the arbitration fees).

Since *Green Tree*, the pendulum seems to have shifted again, with most courts evaluating fee-splitting provisions on a case-by-case basis and requiring employees to prove that they cannot afford the costs of arbitration. *See, e.g.*, *Faber v. Menard, Inc.*, 367 F.3d 1048, 1053–54 (8th Cir. 2004). In *Blair v. Scott Specialty Gases*, 283 F.3d 595, 608 (3d Cir. 2002), the Third Circuit held that an employee's affidavit demonstrating that she had negative income and negative assets did not relieve the district court of making a factual determination of her ability to afford the probable arbitration fees, but in *Spinetti v. Service Corp. International*, 324 F.3d 212, 216 (3d Cir. 2003), the Third Circuit affirmed the district court's determination of inability to pay. In *Morrison v. Circuit City Stores*, 317 F.3d 646, 668–70 (6th Cir. 2003), the Sixth Circuit, en banc, held that courts should consider the effect of a fee-shifting provision not only on the employee bringing a claim, but also on other employees for whom high fees might deter bringing a future claim.

The D.C. Circuit seems to be backing away from the categorical approach it adopted in *Cole*. *See Brown v. Wheat First Securities, Inc.*, 257 F.3d 821, 825 (D.C. Cir. 2001) (holding that *Cole* does not apply to state common law retaliatory discharge claims); *LaPrade v. Kidder, Peabody & Co.*, 246 F.3d 702, 707–08 (D.C. Cir. 2001) (enforcing an award which taxed \$8,376 in fees against successful plaintiff).

¹⁰⁹ *Wyatt, V.I., Inc. v. Hovensa*, No. Civ. 2002/0029, 2002 WL 31599790 (D. V.I. June 5, 2002).

prohibiting the Commissioner of the Virgin Islands Department of Labor from trying to prevent the company from including an arbitration agreement in its employment contracts.¹¹⁰ The United States District Court for the District of the Virgin Islands noted that AAA had examined the arbitration agreement, had found that it complied with the Employment Protocol and with AAA's arbitration rules, and had agreed to administer disputes arising under it.¹¹¹ The court examined the arbitration agreement and agreed with AAA's assessment, finding that the agreement was procedurally fair and that there was "nothing hidden or sneaky about" it.¹¹²

Similarly, in *Gipson v. Cross Country Bank*,¹¹³ a credit card holder brought a class action against a bank for violation of the federal Fair Credit Billing Act.¹¹⁴ The bank moved to dismiss the class action and to compel arbitration pursuant to clauses in the credit card agreement requiring arbitration and prohibiting class actions.¹¹⁵ The United States District Court for the Middle District of Alabama noted that the three arbitration service providers¹¹⁶ listed in the credit card agreement all had rules consistent with the Consumer Protocol providing that the arbitrator would be authorized to award any relief that would have been available in court.¹¹⁷ Based on this, the court concluded that the arbitration and class action clauses would not prevent the credit card holder from vindicating her statutory rights,¹¹⁸ and granted the bank's motions.¹¹⁹

Just as courts have favorably noted an arbitration rule's consistency with the Protocols, courts often cite to an arbitration rule's inconsistency with the Protocols as evidence that the rule is lopsided and unenforceable. For example, in *Hooters of America, Inc. v. Phillips*,¹²⁰ the United States District Court for the District of South Carolina refused to enforce an arbitration agreement that varied considerably from the Employment Protocol, particularly with regard to arbitrator selection procedures.¹²¹ The Fourth

¹¹⁰ *Id.* at *1.

¹¹¹ *Id.* at *4-5.

¹¹² *Id.* at *5.

¹¹³ *Gipson v. Cross Country Bank*, 294 F. Supp. 2d 1251 (M.D. Ala. 2003).

¹¹⁴ 15 U.S.C. § 1666(c) (2000).

¹¹⁵ *Gipson*, 294 F. Supp. 2d at 1254.

¹¹⁶ *Id.* at 1254 n.1.

¹¹⁷ *Id.* at 1260 n.5.

¹¹⁸ *Id.* at 1260.

¹¹⁹ *Id.* at 1264-65.

¹²⁰ *Hooters of Am. Inc., v. Phillips*, 39 F. Supp.2d 582 (D. S.C. 1998), *aff'd*, 173 F.3d 933 (4th Cir. 1999).

¹²¹ *Id.* at 598 n.15, 600-02.

Circuit affirmed, noting testimony from an AAA official that Hooters' arbitration rules "so deviated from minimum due process standards that [AAA] would refuse to arbitrate under those rules."¹²²

Similarly, in *Martinez v. Master Protection Corp.*,¹²³ the California Court of Appeals for the Second District refused to enforce an arbitration agreement that, among other things, imposed a short statute of limitations, and which AAA had twice rejected as inconsistent with the Employment Protocol and its own employment arbitration rules.¹²⁴ In *Pine Ridge Homes, Inc. v. Stone*,¹²⁵ the Dallas division of the Texas Court of Appeals refused to enforce an arbitration agreement that, among other things, required the consumer to pay the arbitration fees of both parties.¹²⁶ AAA had refused to administer the arbitration because the fee provision was inconsistent with the Consumer Protocol and its own consumer arbitration rules.¹²⁷

A final case, in which the Employment Protocol is cited but unfortunately provides the court little guidance, is *Parilla v. IAP Worldwide Services VI, Inc.*¹²⁸ Virgen Parilla sued her former employer, IAP, for discrimination, breach of contract, and several torts.¹²⁹ IAP sought to compel arbitration pursuant to a predispute arbitration agreement.¹³⁰ Parilla argued that the arbitration agreement was unconscionable for six reasons.¹³¹ First, she argued that a requirement that she present her claim to the employer within thirty days functioned as an unconscionably short statute of limitations.¹³² The Protocol does not address employer attempts to shorten the applicable statute of limitations, though the Protocol's requirement that the arbitrator should be empowered to award any relief permitted by law¹³³ could be interpreted as prohibiting a shortened statute of limitations. The

¹²² *Hooters*, 173 F.3d at 939.

¹²³ *Martinez v. Master Protection Corp.*, 12 Cal. Rptr. 3d 663 (Cal. Ct. App. 2004).

¹²⁴ *Id.* at 667, 672 n.5.

¹²⁵ *Pine Ridge Homes, Inc. v. Stone*, 2004 WL 1730170 (Tex. App. 2004). The court found that the agreement was "so one-sided . . . as to render it unconscionable." *Id.* at *3.

¹²⁶ *Id.* at *2.

¹²⁷ *Id.* at *3.

¹²⁸ *Parilla v. IAP Worldwide Services VI, Inc.*, 368 F.3d 269 (3d Cir. 2004).

¹²⁹ *Id.* at 273.

¹³⁰ *Id.*

¹³¹ *Id.* at 274.

¹³² *Id.* at 277-78.

¹³³ *Employment Protocol*, *supra* note 1, § C.5.

court, without referring to the Protocol on this issue, held that the shortened statute of limitations was unconscionable.¹³⁴

Second, Parilla argued that a provision requiring each party to pay its own attorney fees was unconscionable.¹³⁵ The Protocol does not directly address whether such a provision is enforceable, though it “encourages” the employer to pay for part of an employee’s fees,¹³⁶ and its requirement that the arbitrator should be empowered to award any relief permitted by law¹³⁷ could be interpreted as requiring that the arbitrator be authorized to award attorneys fees when the employee brings a claim under a statute with a fee-shifting provision, such as Title VII. The court, without referring to the Protocol on this issue, held that the attorney fee provision was unconscionable because the provision favored the employer as the party with the greater resources.¹³⁸

Third, Parilla argued that the arbitration agreement’s confidentiality provision was unconscionable.¹³⁹ The Protocol does not address confidentiality. The court noted that the arbitration agreement’s confidentiality provision was based on AAA rules, and that the AAA rules were generally consistent with the Protocol.¹⁴⁰ The court therefore held that the confidentiality provision was not unconscionable.¹⁴¹

Fourth, Parilla argued that the arbitration agreement was unenforceable because it required that all claims must be resolved by arbitration and not by any administrative agency.¹⁴² She argued that this provision impermissibly interfered with the statutory role of agencies such as the Equal Employment Opportunity Commission (EEOC).¹⁴³ The Protocol does not address the role

¹³⁴ *Parilla*, 368 F.3d at 278.

¹³⁵ *Id.* at 278–79.

¹³⁶ *Employment Protocol*, *supra* note 1, § B.2.

¹³⁷ *Id.* § C.5.

¹³⁸ *Parilla*, 368 F.3d at 279.

¹³⁹ *Id.* at 279–82.

¹⁴⁰ *Id.* at 280 n.10.

¹⁴¹ *Id.* at 281.

¹⁴² *Id.* at 282.

¹⁴³ The Supreme Court addressed a related issue in *EEOC v. Waffle House*, 534 U.S. 279, 279 (2002). In that case, an employee who had signed a predispute arbitration agreement filed a charge of disability discrimination with the EEOC against his employer, Waffle House. *Id.* The EEOC subsequently sued Waffle House for unlawful discrimination against the employee. *Id.* Waffle House moved to stay the suit and compel arbitration. *Id.* The district court denied the motion. *Id.* The court of appeals reversed, ordering arbitration, but limiting the EEOC’s potential remedies to injunctive relief. *Id.*

The issue before the Court was whether an arbitration agreement between an employer and the employee barred the EEOC from pursuing victim-specific judicial

of administrative agencies when an employee has signed an arbitration agreement. The court, however, noted that the EEOC has no statutory authority to “resolve” discrimination claims, but only the authority to investigate and conciliate;¹⁴⁴ and that IAP’s arbitration agreement forbade neither Parilla from filing a claim nor the EEOC from performing its statutory functions.¹⁴⁵ The court therefore held that this provision did not render the arbitration agreement unenforceable.¹⁴⁶

Fifth, Parilla argued that the arbitration agreement’s exclusion of any arbitrator residing in the Virgin Islands (where the claim arose) or Puerto Rico was an attempt to “rig the pool” of arbitrators.¹⁴⁷ The Protocol requires unbiased arbitrators¹⁴⁸ and provides that the parties must either jointly choose their arbitrator or delegate this authority to an arbitral service provider.¹⁴⁹ The court agreed with Parilla that an unbiased pool of arbitrators is a prerequisite to enforceability, but disagreed with her contention that IAP’s geographical exclusion had the effect of creating a biased pool.¹⁵⁰ The court did not consider, and apparently Parilla did not argue, that this provision would have the effect of substantially increasing the costs of arbitration, and that the increased costs would impede employee access to the arbitral forum.

Finally, Parilla pointed to the arbitration agreement’s provision that if “[IAP] is successful in the arbitration, the Employee agrees to reimburse [IAP] for the arbitrator’s fees and expenses if so directed by the arbitrator.”¹⁵¹ Parilla argued that the high costs of arbitration effectively would deny her a forum to vindicate her statutory rights.¹⁵² The Protocol recommends cost sharing, but also recognizes that since employees often

relief—such as backpay, reinstatement, and damages—in an enforcement action. *Id.* at 282. The Court held that the EEOC was free to seek victim-specific relief. *Id.* at 295–96. The Court reasoned that Title VII, which created the EEOC, “makes the EEOC the master of its own case,” and that the statute gave the agency—not the courts—the authority “to determine whether public resources should be committed to the recovery of victim-specific relief.” *Id.* at 280.

¹⁴⁴ For a discussion of the legislative history behind the Congressional decision to deny the EEOC adjudicatory authority, see Richard A. Bales, *Compulsory Employment Arbitration and the EEOC*, 27 PEPP. L. REV. 1, 7–8 (1999).

¹⁴⁵ *Parilla*, 368 F.3d at 282.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 282.

¹⁴⁸ *Employment Protocol*, *supra* note 1, § C.1.

¹⁴⁹ *Id.* § C.3.

¹⁵⁰ *Parilla*, 368 F.3d at 282–83.

¹⁵¹ *Id.*

¹⁵² *Id.*

cannot afford these fees, the arbitrator should be authorized to determine the allocation of the arbitrator's fees.¹⁵³ Thus, IAP's provision was not entirely inconsistent with the Protocol, insofar as the arbitrator was given the final authority to assess fees. On the other hand, IAP's provision could be read as creating a presumption that the arbitrator would direct losing employees to pay for all the arbitration fees, which would be inconsistent with the Protocol's concern for employees who are likely to be unable to afford such fees. The court, without citing to the Protocol, remanded the case to the district court for a determination of "whether the reasonably anticipatable fees and expenses of the arbitrator and Parilla's financial circumstances are such that the prospect of her having to pay them in the event she loses unduly burdens her right to seek relief."¹⁵⁴

The court ultimately found that the thirty-day notice and the attorney-fee provisions were unconscionable, and remanded the case to the district court for a determination of whether these provisions should be severed and whether the "loser pays arbitration fees" provision rendered the arbitration agreement unenforceable as applied to Parilla.¹⁵⁵ More important to the point of this article, however, is the fact that the Protocol did not provide direct guidance to the court on the fairness (and, derivatively, the enforceability) of any of the six arbitration provisions that Parilla challenged. This case is far from unique in this respect. The Protocol provides no guidance at all on many of the issues over which courts currently are divided. These issues are discussed below.

IV. TWENTY UNRESOLVED ISSUES

As discussed in the Introduction to this article, the Employment Protocol has been criticized on many grounds. Such criticisms have included the failure to take a position on predispute arbitration, the absence of monitoring and enforcement provisions, an ideological tilt toward employers, and the absence of demographic diversity among the drafters.¹⁵⁶ Perhaps the most potent criticism—and one that grows more applicable by the day—is that the Employment Protocol has largely been left behind by ongoing legal developments. The Protocol accomplished its purpose of creating a baseline of minimal procedural protections for employees, but it no longer provides the kind of prospective guidance that it did a decade ago.

¹⁵³ *Employment Protocol*, *supra* note 1, § C.6.

¹⁵⁴ *Parilla*, 368 F.3d at 284.

¹⁵⁵ *Id.* at 289.

¹⁵⁶ *See supra* notes 9–14 and accompanying text.

The cases discussed in Part III.D illustrate several of the issues on which the Protocol provides either no or insufficient guidance. These issues may be broadly divided into six major categories: contract formation issues, barriers to access, process issues, remedies issues, FAA issues, and conflicts of interest.

A. Contract Formation Issues

“Contract formation” issues concern whether the purported arbitration “agreement” creates an enforceable obligation. These issues turn on interpretation of state contract law. This is because Section 2 of the FAA provides that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”¹⁵⁷ Thus, in *Gilmer*, the Supreme Court held that arbitration agreements would be enforced absent “the sort of fraud or overwhelming economic power that would provide grounds ‘for the revocation of any contract.’”¹⁵⁸

The first issue is the notice that an employee should receive before the employee is held bound by an arbitration agreement. This issue has arisen, for example, when an employer included the agreement in employees’ paycheck envelopes,¹⁵⁹ when an employer sent the agreement to employees via a mass e-mail,¹⁶⁰ and when an employer gave arbitration agreements written in English to Spanish-speaking employees.¹⁶¹ As discussed in Part III.B, the Consumer Protocol contains significantly stronger notice requirements than does the Employment Protocol.¹⁶²

¹⁵⁷ 9 U.S.C. § 2 (2000).

¹⁵⁸ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985)).

¹⁵⁹ *Compare* *Tinder v. Pinkerton Sec.*, 305 F.3d 728, 736 (7th Cir. 2002) (enforcing arbitration agreement), *with* *Buckley v. Nabors Drilling USA, Inc.*, 190 F. Supp. 2d 958, 965 (S.D. Tex. 2002) (refusing to enforce arbitration agreement).

¹⁶⁰ *Campbell v. Gen. Dynamics Gov’t Sys. Corp.*, 321 F. Supp. 2d 142, 149 (D. Mass. 2004) (holding that an employer’s mass e-mail message to employees advising them of the establishment of a new arbitration policy for legal claims and describing the policy only through links was insufficient notice).

¹⁶¹ *Prevot v. Phillips Petroleum Co.*, 133 F. Supp. 2d 937, 939–41 (S.D. Tex. 2001) (refusing to enforce arbitration agreement); *see also* *Am. Heritage Life Ins. Co. v. Lang*, 321 F.3d 533, 538–39 (5th Cir. 2003) (finding in a consumer arbitration case, an illiterate borrower who claimed a lender did not inform him that he was signing an arbitration agreement created an issue of fact on whether the borrower consented to arbitration).

¹⁶² *See supra* notes 83–84 and accompanying text.

A second and related issue concerns the opportunity an employee is given to consider an arbitration agreement before signing it,¹⁶³ such as when an arbitration agreement is buried amidst a mountain of employment-related forms,¹⁶⁴ an employee is given a short amount of time to review a long arbitration agreement,¹⁶⁵ an employer posts an arbitration agreement on its website but cannot demonstrate that employees were aware of it,¹⁶⁶ or an arbitration "agreement" refers to arbitration rules to which the employee is denied access.¹⁶⁷

A third issue is whether an employer may retain the unilateral right to modify an employment arbitration agreement.¹⁶⁸ A fourth issue is the enforceability of arbitration agreements that apply to employee claims but

¹⁶³ A related issue is the effect of opt-out provisions. *See, e.g.*, *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1200 (9th Cir. 2002) (holding that arbitration agreement that gave employee the ability to opt out of arbitration was not procedurally unconscionable).

¹⁶⁴ *See, e.g.*, *Maye v. Smith Barney Inc.*, 897 F. Supp. 100, 108 (S.D.N.Y. 1995) (enforcing arbitration agreement); *Berger v. Cantor Fitzgerald Sec.*, 942 F. Supp. 963, 967 (S.D.N.Y. 1996) (refusing to enforce arbitration agreement); *see also Shaffer v. ACS Gov't Servs., Inc.*, 321 F. Supp. 2d 682, 687 (D. Md. 2004) (refusing to enforce arbitration clause contained on page 56 of a 71-page employee guidebook).

¹⁶⁵ *Brennan v. Bally Total Fitness*, 198 F. Supp. 2d 377, 383 (S.D. N.Y. 2002) (refusing to enforce arbitration agreement where employer gave employee no more than fifteen minutes to review a sixteen-page single-spaced agreement).

¹⁶⁶ *Acher v. Fujitsu Network Commc'ns, Inc.*, 354 F. Supp. 2d 26, 37 (D. Mass. 2005).

¹⁶⁷ *See, e.g.*, *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 936 (4th Cir. 1999) (refusing to enforce arbitration agreement where the arbitral rules were contained in a separate document to which employees were not given access until after a dispute had arisen); *cf. Tarulli v. Circuit City Stores, Inc.*, 333 F. Supp. 2d 151, 157–58 (S.D. N.Y. 2004) (concluding arbitration agreement is not unconscionable where agreement stated that the applicant must request a copy of the arbitration rules if she had not received one, and employee did not do so).

¹⁶⁸ *E.g., compare Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 939–40 (4th Cir. 1999) (holding arbitration agreement that gave employer unilateral right to modify arbitral procedures was unenforceable), *and Floss v. Ryan's Family Steakhouses, Inc.*, 211 F.3d 306, 315–16 (6th Cir. 2000) (stating ability to choose nature of forum and alter arbitration without notice or consent renders arbitration agreement unenforceable), *and Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir. 2002) (holding that an arbitration agreement allowing one party the unfettered right to alter the arbitration agreement's existence or its scope is illusory), *with Blair v. Scott Specialty Gases*, 283 F.3d 595, 604 (3d Cir. 2002) (concluding arbitration agreement that gave employer unilateral right to modify arbitral procedures upon notice to employee was enforceable).

not to employer claims.¹⁶⁹ A fifth issue, related to issues three and four, is the type of consideration that an employer must give to an employee in return for the employee's promise to arbitrate. Many courts, for example, have found consideration lacking when the employer retains the unilateral right to modify the agreement or when the arbitration agreement applies only to employee claims or both.¹⁷⁰ Other courts, however, have held that consideration exists when the employer merely agrees to be bound by the arbitral decision,¹⁷¹ or by the employee's continued employment.¹⁷²

A sixth issue is the one that the drafters of the Employment Protocol expressly agreed to disagree on: whether arbitration agreements signed before a dispute has arisen should be enforceable, or whether enforcement should be limited to post-dispute arbitration agreements.¹⁷³

B. *Barriers to Access*

Another set of issues concerns requirements that employers impose that may make it difficult or impossible for employees to pursue their employment claims. In *Gilmer*, the Supreme Court held that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights

¹⁶⁹ *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 181 (3d Cir. 1999) (finding arbitration agreement enforceable where one party had option of litigating in court but other party was required to arbitrate); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1130–32 (7th Cir. 1997) (refusing to enforce agreement by which employee, but not employer, agreed to arbitrate all future claims); *Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1101, 1108 (9th Cir. 2003) (quoting *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1174 (9th Cir. 2003)) (holding even where arbitration clause requires both parties to arbitrate, because the possibility of the employer initiating an action against the employee is "so remote," arbitration clauses are unenforceable unless employer can show the arbitration clause is bilateral); *see also Conesco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 344 (Ky. Ct. App. 2001) (holding that a consumer arbitration agreement was enforceable despite a clause specifying that it applied only to claims brought by the consumer against the company, and not vice-versa).

¹⁷⁰ *Harmon v. Philip Morris, Inc.*, 697 N.E.2d 270, 272 (Ohio Ct. App. 1997) (finding no consideration where arbitration agreement required employees to arbitrate claims against the employer but not vice-versa); *cf. Dantz v. Am. Apple Group, LLC*, 123 F. App'x 702, 710 (6th Cir. 2005) (finding consideration present where both employer and employee agreed to arbitrate claims against each other).

¹⁷¹ *See, e.g., Batory v. Sears, Roebuck & Co.*, 124 F. App'x 530, 533 (9th Cir. 2005).

¹⁷² *See, e.g., Tinder v. Pinkerton Sec.*, 305 F.3d 728, 734–35 (7th Cir. 2002); *see also Oblix, Inc. v. Winiecki*, 374 F.3d 488, 491 (7th Cir. 2004) (holding that employee's salary was sufficient consideration for arbitration agreement).

¹⁷³ *See supra* notes 10–13 and 109–119 and accompanying text.

afforded by the statute; it only submits their resolution to an arbitral, rather than a judicial, forum.”¹⁷⁴ An arbitration agreement that restricts an employee’s substantive rights or access to a dispute resolution forum thus is an unenforceable waiver of the employee’s substantive rights.¹⁷⁵

One such barrier-to-access issue—the seventh issue overall—is the enforceability of arbitration agreements that impose a statute of limitations (either explicitly or through a notice provision) different from the statute of limitations imposed by law.¹⁷⁶ An eighth issue is the enforceability of arbitration agreements that impose filing fees on employees.¹⁷⁷ A ninth issue is the enforceability of arbitration agreements that attempt to impose on the employee some or all of the cost of the arbitrator.¹⁷⁸

A tenth issue is the enforceability of arbitration clauses that forbid employees from bringing claims as an arbitral class action.¹⁷⁹ An eleventh issue is the enforceability of agreements containing forum selection clauses in which, for example, a company headquartered in California but with employees in Hawai’i requires that all arbitrations occur in California.¹⁸⁰

¹⁷⁴ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

¹⁷⁵ *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51–52 (1974).

¹⁷⁶ *E.g., compare Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1175 (9th Cir. 2003) (holding arbitration agreement that imposed one-year statute of limitations is unenforceable), *with Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 230–32 (3d Cir. 1997) (holding arbitration agreement that imposed one-year statute of limitations is enforceable).

¹⁷⁷ *Ingle*, 328 F.3d at 1177 (imposing \$75 filing fee rendered arbitration agreement unenforceable); *Williams v. Cigna*, 197 F.3d 752, 765 (5th Cir. 1999) (enforcing arbitral award which, among other things, imposed a \$3150 “forum fee” on plaintiff).

¹⁷⁸ *See supra* note 108; *but cf.* Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contracts*, draft Feb. 21, 2005 (on file with author) (arguing that courts should not focus on the finances of individual claimants).

¹⁷⁹ *E.g., compare Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1101, 1107 (9th Cir. 2003) (holding waiver of class actions renders arbitration clause unenforceable), *with Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002) (holding waiver of class actions does not render arbitration clause unenforceable); *see also* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000).

¹⁸⁰ *See Domingo v. Amerquest Mortgage Co.*, 70 F. App’x 919, 920 (9th Cir. 2003) (refusing to enforce arbitration agreement that, among other things, required an employee in Hawai’i to arbitrate a claim in California); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 299–300 (5th Cir. 2004) (enforcing arbitration agreement containing forum selection clause because employees all lived near the designated forum); *Ciango v. Amerquest Mortgage Co.*, 295 F. Supp. 2d 324, 330 (S.D.N.Y. 2003) (holding that the validity and meaning of specific provisions within an arbitration agreement, including a

A twelfth issue is confidentiality, particularly with regard to whether it hinders the identification of certain employers as repeat offenders of employment laws.¹⁸¹ For example, in *Zuver v. Airtouch Communications, Inc.*,¹⁸² the Washington Supreme Court noted the widespread inclusion of confidentiality provisions in arbitration agreements, but nonetheless held that such a provision was substantively unconscionable when included in an employment arbitration agreement because it hindered employees' ability to prove a pattern of discrimination or to take advantage of prior arbitral findings.¹⁸³ The court also noted that "keeping past findings secret undermines an employee's confidence in the fairness and honesty of the arbitration process and thus, potentially discourages that employee from pursuing a valid discrimination claim."¹⁸⁴

C. Process Issues

Yet another set of issues concerns arbitral provisions that govern the process by which arbitration is conducted. As discussed above in Part IV.B, the Gilmer Court held that arbitration agreements are enforceable because they represent only a change in forum and are not a prospective waiver of statutory rights. Substantive rights, however, depend for their enforcement upon the existence of at least minimal procedures. At a minimum, then, "statutory rights include both a substantive protection and access to a neutral forum in which to enforce those protections."¹⁸⁵ A procedurally lopsided arbitration agreement that effectively waives an employee's ability to enforce an underlying statutory antidiscrimination law therefore would effectively

forum selection clause that would require a New York employee to arbitrate in California, is a matter for the arbitrator to decide).

¹⁸¹ See David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 63–64 (arguing that enforcement of antidiscrimination laws through the courts is critical for deterring employer violations and exposing systemic patterns of discrimination); Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685, 704 (2004) (explaining arbitration "[limits] consumer's [sic] and other's [sic] ability to know whether they are patronizing a lawbreaker").

¹⁸² *Zuver v. Airtouch Commc'ns, Inc.*, 103 P.3d 753 (2004). Thanks to Dennis Nolan for calling my attention to this case.

¹⁸³ *Id.* at 765.

¹⁸⁴ *Id.*

¹⁸⁵ *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997).

waive the employee's substantive rights, contrary to the Supreme Court's prescription in *Gilmer*.¹⁸⁶

One such process issue—the thirteenth issue overall—is whether additional safeguards are required to ensure that employees (who, unlike employers, are not repeat players in arbitration)¹⁸⁷ can meaningfully participate in the selection of arbitrators.¹⁸⁸

A fourteenth issue is the availability of discovery. The Protocol's requirement of "[a]dequate but limited" discovery is a good starting point, but provides little guidance on where arbitrators and courts should draw the line between balancing employees' need for information to develop their cases against the laudable goal of preventing arbitral discovery from morphing into the expensive and time-consuming discovery permitted by the federal and state rules of civil procedure. So far, most courts seem to have resolved the issue by enforcing arbitration clauses that give the arbitrator discretion to permit or limit discovery, but refusing to enforce clauses that impose absolute limitations on discovery (e.g., each party is limited to one,

¹⁸⁶ *See id.*

¹⁸⁷ Unlike labor arbitration, where both the employer and the union are repeat players, in employment arbitration, only the employer is a repeat player. As discussed above in Part II.B, this was one of the factors that led to the Dunlop Commission's hesitancy to endorse labor arbitration as a model for non-union employment dispute resolution, and to initiate the process that resulted in the creation of the Employment Protocol. Asymmetrical repeat-player status results in two systemic employer advantages. The first is that the employer is more familiar with the pool of potential arbitrators and therefore is in a better position than an employee to select an arbitrator favorable to its side. The second is that an arbitrator interested in generating future business will be predisposed to favor the employer. *See* Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223 (1998); Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189 (1997). *But see* Lisa B. Bingham & Shimon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence That Self-Regulation Makes a Difference*, in ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF NEW YORK UNIVERSITY'S 53D ANNUAL CONFERENCE ON LABOR 303, 324 (Samuel Estreicher & David Sherwyn eds., 2004) (finding no statistically significant evidence that employers confronting the same arbitrator in a second case have a higher probability of success).

¹⁸⁸ *See, e.g.,* *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938–39 (4th Cir. 1999) (finding that the arbitrator-selection process was biased because, among other things, the employer unilaterally controlled the pool of arbitrators); *Parilla v. IAP Worldwide Servs. VI, Inc.*, 368 F.3d 269, 283 (3d Cir. 2004) (finding that a geographical exclusion of arbitrators did not create a biased arbitrator-selection process).

eight-hour deposition) or that forbid discovery altogether.¹⁸⁹ This approach, however, provides no guidance to arbitrators as to how they should strike the discovery balance, and provides little guidance to a court faced with a scenario in which an arbitrator's refusal to permit discovery appears to have denied an employee the ability to vindicate a statutory right.

D. Remedies Issues

Another set of issues concerns remedies. Employer attempts to restrict employee access to statutory remedies arguably run afoul of Gilmer's prescription that arbitration is a change of forum only, and not a prospective waiver of substantive rights.

One such remedies issue—and the fifteenth issue overall—is the enforceability of contractual limitations on the arbitrator's authority to award relief, especially when these contractual limitations are inconsistent with the relief permitted by statute. Courts have taken at least five different approaches to this issue.¹⁹⁰ A sixteenth issue is the enforceability of arbitral attorney-fee provisions, especially as they relate to fee-shifting statutes.¹⁹¹

¹⁸⁹ A pair of 2003 cases decided by Federal District Judge Traugher, of the Middle District of Tennessee, illustrates this approach. In *Wilks v. Pep Boys*, 241 F. Supp. 2d 860, 864–65 (M.D. Tenn. 2003), Judge Traugher enforced an arbitration agreement that presumptively limited each party to the deposition of one witness and one expert, but permitted the arbitrator to order additional depositions upon a showing of “substantial need.” In *Walker v. Ryan's Family Steak Houses, Inc.*, 289 F. Supp. 2d 916, 925 (M.D. Tenn. 2003), however, Judge Traugher refused to enforce an arbitration agreement that limited each party to one deposition and permitted the arbitrator to order additional depositions only “in extraordinary fact situations and for good cause shown.” See also *Williams v. Katten, Muchin & Zavis*, No. 92C5654, 1996 WL 717447, at *4 (N.D. Ill. Dec. 9, 1996) (enforcing arbitration award in favor of employer despite employee's argument that the arbitrator only permitted her to depose one of the four witnesses she wished to depose; the court noted that the arbitrator had considered but rejected the employee's request to depose the remaining three witnesses). But cf. *Continental Airlines, Inc. v. Mason*, 87 F.3d 1318 (table), 12 IER Cas. 160, 1996 WL 341758 at *2 (9th Cir. June 19, 1996) (enforcing, over objections of unconscionability, an arbitration clause that did not provide for any discovery by the employee; “[t]here is nothing that shocks the conscience about an arbitration procedure that does not provide for discovery . . .”).

¹⁹⁰ The first is to sever the claim for relief which the arbitrator is not permitted to resolve, require the parties to submit the remaining claims to arbitration, and stay the non-arbitrated claim for resolution by the court after an arbitration award has been made. See, e.g., *DiCrisci v. Lyndon Guar. Bank of N.Y.*, 807 F. Supp. 947, 953–54 (W.D.N.Y. 1992). The second is to strike the arbitration clause altogether and allow the entire claim to be litigated. See, e.g., *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998); *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 267 (3d Cir. 2003) (striking arbitration agreement which, among other things, limited employees' relief to

E. FAA Issues

Another set of issues concerns the interpretation of the FAA. These issues are the proper province of the courts, and probably would not be appropriate subjects of a revised Employment Protocol.

One such issue of FAA interpretation—and the seventeenth issue overall—is whether the EEOC may pursue a claim that an employee already has brought to arbitration.¹⁹² An eighteenth issue is the breadth of the FAA's exclusion of "transportation workers."¹⁹³

reinstatement and "net pecuniary damages"). The third is to strike the limitation-of-remedies clause and to give the arbitrator the authority to award damages to the full extent permitted by law. *See, e.g.,* Hadnot v. Bay, Ltd., 344 F.3d 474, 478 & n.14 (5th Cir. 2003). The fourth is to let the arbitrator decide whether to award the relief. *See, e.g.,* Great W. Mortgage Corp. v. Peacock, 110 F.3d 222, 232 (3d Cir. 1997); Gannon v. Circuit City Stores, Inc., 262 F.3d 677, 681 n.6 (8th Cir. 2001). The final route is to enforce the agreement as written. *See, e.g.,* Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994).

¹⁹¹ In *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978), the Supreme Court held that a prevailing employer in a Title VII case may only be awarded attorney fees where the employee's lawsuit was "frivolous"; allowing the routine award of attorney fees to prevailing employers would undermine Title VII by deterring employees from bringing claims. This leaves open, however, issues such as whether and under what circumstances arbitrators should award attorney fees, the enforceability of arbitral provisions in which an employee waives the right to recover attorney fees, and whether courts should confirm arbitral awards that either deny attorney fees to a prevailing claimant or that award attorney fees to a losing claimant. *See Perez v. Globe Airport Sec. Servs., Inc.*, 253 F.3d 1280, 1287 (11th Cir. 2001), *vacated*, 294 F.3d 1275 (11th Cir. 2002) (denying enforcement of arbitration agreement that contained clause requiring fee-splitting between the parties; clause impermissibly limited the employee's remedies contrary to the Title VII provision that provides fee-shifting to prevailing plaintiffs); *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 584–85 (7th Cir. 2001) (an arbitrator's refusal to award attorney fees to the prevailing party as authorized by state law cannot be vacated or modified for "manifest disregard" of the law); *see also Musnick v. King Motor Co.*, 325 F.3d 1255, 1260–61 (11th Cir. 2003) (enforcing a "loser pays" provision in an arbitration agreement); *Manuel v. Honda R & D Ams., Inc.*, 175 F. Supp. 2d 987, 994–95 (S.D. Ohio 2001) (same).

¹⁹² For a case presenting an analogous issue, see *Senich v. American-Republican, Inc.*, 215 F.R.D. 40, 44–45 (D. Conn. 2003) (permitting EEOC to seek victim-specific relief for employees who had signed a waiver and release as a condition of receiving benefits under an employer severance program).

¹⁹³ *See, e.g., Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286, 1289–90 (11th Cir. 2005) (finding employee was not exempt even though his job duties as an account manager involved making out-of-state deliveries of goods in his employer's truck); *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 593–94 (3d Cir. 2004) (finding employee was exempt because, as a field services supervisor at a package transportation and delivery

A nineteenth issue is whether a union may agree to the arbitration of statutory claims on behalf of its members. In *Wright v. Universal Maritime Service Corp.*,¹⁹⁴ the Supreme Court dodged the issue¹⁹⁵ by holding that any such agreement must be “clear and unmistakable,”¹⁹⁶ and the Court has not conclusively resolved the issue.¹⁹⁷

F. *Conflicts of Interest*

The twentieth issue concerns arbitral conflicts-of-interest. The Employment Protocol currently permits an arbitrator to cure conflicts by disclosing them to the parties.¹⁹⁸ Some commentators have argued that this “disclose and consent” approach does not sufficiently protect weaker parties such as employees and that at least some arbitral conflicts-of-interest should be non-waivable and non-consentable.¹⁹⁹

company, he supervised truck drivers); *Lenz v. Yellow Transp. Inc.*, 352 F. Supp. 2d 903, 907–08 (S.D. Iowa 2005) (employee was exempt because, as a customer service representative, he was responsible for coordinating the movement of goods); *Lorntzen v. Swift Transp., Inc.*, 316 F. Supp. 2d 1093, 1097 (D. Kan. 2004) (employee was not exempt even though as a safety compliance assistant, she was responsible for maintaining paperwork associated with delivery of goods by truck).

¹⁹⁴ *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998).

¹⁹⁵ Dennis R. Nolan, *Employment Arbitration After Circuit City*, 41 BRANDEIS L. J. 853, 862–63 (2003).

¹⁹⁶ *Wright*, 525 U.S. at 80 (quoting *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983)).

¹⁹⁷ See *Safrit v. Cone Mills Corp.*, 248 F.3d 306, 308 (4th Cir. 2001) (interpreting a labor arbitration clause as constituting a clear and unmistakable waiver of the employee’s right to sue under Title VII for sex discrimination); cf. *E. Associated Coal Corp. v. Massey*, 373 F.3d 530, 537 (4th Cir. 2004) (holding that a collective bargaining agreement that required arbitration of claims arising under the federal Americans with Disabilities Act did not clearly and unmistakably require arbitration of claims arising under a parallel state statute). See also *Air Line Pilots Ass’n, Int’l v. Northwest Airlines, Inc.*, 211 F.3d 1312 (D.C. Cir. 2000) (per curiam en banc), *cert. denied*, 121 S. Ct. 565 (2000), *reinstating* 199 F.3d 477, 484–86 (D.C. Cir. 1999) (in a case arising under the Railway Labor Act, a union may not lawfully agree to binding arbitration of employees’ discrimination claims, and such an arbitration clause therefore is not a mandatory subject of bargaining); Theodore J. St. Antoine, *Gilmer in the Collective Bargaining Context*, 16 OHIO ST. J. ON DISP. RESOL. 491, 501–10 (2001) (arguing that unions should be free to make arbitration the exclusive forum for vindicating statutory rights).

¹⁹⁸ *Employment Protocol*, *supra* note 1, § C.4.

¹⁹⁹ See, e.g., Carrie Menkel-Meadow, *Ethics Issues in Arbitration and Related Dispute Resolution Processes: What’s Happening and What’s Not*, 56 U. MIAMI L. REV. 949, 960–61 (2002); Harding, *supra* note 3, at 454.

Recent empirical research in the social sciences supports this approach, and indicates not only that conflicts-of-interest cannot be cured by disclosure, but that disclosure may exacerbate the problem. Professors Daylian Cain, George Loewenstein, and Don Moore recently conducted an experiment in which they paid Carnegie Mellon undergraduates to guess at the value of coins in a jar.²⁰⁰ “Estimators” received only a short, distant glimpse at the jar; “Advisors” had much more time to examine and evaluate the jar’s contents.²⁰¹ Advisors then gave written estimates to the Estimators.²⁰²

When the study authors paid both sets of students based on the accuracy of the Estimators’ guesses (i.e., both parties had an interest in accurate guesses), Estimators tended to follow the advice of the Advisors.²⁰³ Then, however, the study authors began to pay Advisors according to how high the Estimators’ guesses were; Estimators continued to be paid according to the accuracy of their own guesses.²⁰⁴ The Advisors, not surprisingly, provided higher estimates, and the Estimators, unaware of the conflict-of-interest, guessed higher and less accurately than they had before.²⁰⁵

Finally, the study authors disclosed the conflict-of-interest to both sides.²⁰⁶ Advisors raised their estimates significantly higher.²⁰⁷ Estimators, aware of the conflict, discounted the Advisors’ estimates, but not enough to offset the amount by which the Estimators had raised their estimates.²⁰⁸ In other words, the disclosure of the conflict-of-interest made the Estimators’ guesses less accurate and more favorable to the Advisors.²⁰⁹

The study authors proffer several explanations for their findings. For example, the psychological difficulty of unlearning or ignoring information, even information that one knows is inaccurate, is likely to cause an advice-receiver to insufficiently discount the biased advice of an advice-giver²¹⁰ (e.g., Estimators insufficiently discounted the advice of the Advisors). Disclosure also can affect the advice-giver, in two ways. First, a strategic advice-giver may provide advice that is even more biased to counteract the

²⁰⁰ Daylian M. Cain et al, *The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest*, 34 J. LEGAL STUD. 1 (2005).

²⁰¹ *Id.* at 9–10.

²⁰² *Id.* at 9.

²⁰³ *Id.* at 10.

²⁰⁴ *Id.*

²⁰⁵ *Id.* 13–14

²⁰⁶ *Id.* at 10.

²⁰⁷ *Id.* at 13.

²⁰⁸ *Id.* at 17.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 6.

diminished weight the advice-giver expects the advice-receiver to place on the advice²¹¹ (e.g., Advisors' estimates were significantly higher when they knew the conflict would be disclosed). Second, the disclosure of a conflict may reduce an advice-giver's (perhaps unconscious) feelings of guilt about giving biased advice, and thus give the advice-giver a perceived "moral license" to bias her advice even further²¹² (e.g., Advisors with a conflict-of-interest actually believed that the coin jars were worth more than they did when there was no conflict).²¹³

Parties in employment arbitration do not receive "advice" from an arbitrator in the same way that an Advisor provided an estimate of the value of the coins to the Estimator.²¹⁴ An arbitrator provides an award, not advice. But an arbitrator may be subjected to the same financial incentives as the Advisor in the conflict-laden parts of the study, such as when the bulk of an arbitrator's business comes from a few employers. Moreover, if bias does color award, the effects are more permanent, because the arbitrator's award is final and virtually unappealable.²¹⁵

In many arbitral contexts, such as labor and commercial arbitration, run-of-the-mill conflicts-of-interest probably are not significant problems. The parties likely are sufficiently sophisticated to discover major conflicts (such as if a potential arbitrator was on the payroll of an industry group) on their own, and to weigh the significance of minor conflicts (such as giving a paid lecture at a union convention) accurately.²¹⁶ Employment and consumer arbitration, especially when the claimant is pro se, is different, however,

²¹¹ *Id.* at 6–7.

²¹² *Id.* at 7.

²¹³ *Id.* at 14.

²¹⁴ An evaluative mediator, however, presents a much closer analogy. The Employment Protocol applies to employment mediation as well as arbitration. See *Employment Protocol*, *supra* note 1, at 534: 403 (stating "[t]he following protocol is offered . . . as a means of providing due process in the resolution by mediation and binding arbitration of employment disputes . . .").

²¹⁵ The FAA permits a reviewing court to vacate an arbitration award in limited circumstances, such as "[w]here there [existed] evident partiality or corruption by the arbitrators." 9 U.S.C. § 10(2). However, the scope of review is "extraordinarily narrow," *Forsythe Int'l, S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1020 (5th Cir. 1990), (quoting *Antwine v. Prudential Bache Secs., Inc.*, 899 F.2d 410, 413 (5th Cir. 1990)), making it very difficult to overturn an award on this basis. See Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 745–49 (1996).

²¹⁶ I am indebted to Dennis Nolan for these examples.

because “unsophisticated [parties] are exactly the ones who are most likely to need protection from exploitation.”²¹⁷

Another potential check on arbitral conflicts is the existence of professional norms. One would hope, for example, that a professional arbitrator would not let a conflict (disclosed or undisclosed) color his award, in the same way that one would hope that a doctor would not let her paid relationship with a drug company affect the advice she gives her patients. However, the social science literature demonstrates that even if a professional is willing to put self-interest aside, she may not be able to do so.²¹⁸ Studies of professionals, such as medical doctors, show that bias much more frequently results from unintentional and unconscious motives than it does from a corrupt and conscious desire for self-enrichment.²¹⁹ Thus, an arbitrator who is earnestly trying to be fair may nonetheless deliver an award tinged with bias, while honestly believing that his award is completely fair and impartial.

A final potential check on arbitral conflicts is the ability of the parties to reject a potential arbitrator who admits a possible conflict—an option not available to the Estimators in the study described above. However, if most bias is unintentional and unconscious, this is likely to compromise the ability of potential arbitrators to recognize and disclose possible conflicts.

This recent social science literature suggests that the Protocol’s “disclose and consent” approach²²⁰ to arbitral conflicts-of-interest does not sufficiently protect employees, and may even be exacerbating the underlying problems caused by the conflicts. This lends considerable support to the argument that at least some arbitral conflicts-of-interest should be non-waivable and non-consentable.²²¹

V. EVOLUTION

The Employment Protocol has been extremely influential. It has been adopted by the major arbitration service providers, it has provided scrupulous employers with a model for drafting balanced arbitration agreements, it has

²¹⁷ Cain et al., *supra* note 200, at 20.

²¹⁸ *See id.* at 5–6.

²¹⁹ Jason Dana & George Loewenstein, *A Social Science Perspective on Gifts to Physicians from Industry*, 290 JAMA 252, 252–54 (2003); Don A. Moore & George Loewenstein, *Self-Interest, Automaticity, and the Psychology of Conflict of Interest*, 17 SOC. JUST. RES. 189, 189–199 (2004).

²²⁰ *Employment Protocol*, *supra* note 1, § C.4.

²²¹ Where to draw this line is beyond the scope of this article. For a discussion of this issue, see Menkel-Meadow, *supra* note 199, at 960–61.

TWENTY UNRESOLVED ISSUES

guided courts in their decisions of whether to enforce particular employment arbitration agreements, and it has inspired the creation of both the Consumer and the Health Care Protocols.

Nonetheless, the Employment Protocol has several shortcomings. Perhaps the most significant shortcoming is that it is quickly becoming outdated. The Protocol was drafted in the early years of employment arbitration, before the drafters could anticipate many of the issues now facing the courts. I have identified twenty such issues; there almost certainly are others that I have missed, and there will be still more by the time this article goes to press.

This suggests two things. First, the Employment Protocol should be revised and updated to provide guidance on the issues currently facing the courts and to anticipate issues likely to arise in the future. Second, as some unscrupulous employers continue to find new and inventive ways to tilt the arbitral playing field in their favor, courts should uphold their responsibility to ensure fair arbitral processes by refusing to enforce lopsided arbitration agreements.

