COMPULSORY ARBITRATION OF EMPLOYMENT CLAIMS: A PRACTICAL GUIDE TO DESIGNING AND IMPLEMENTING ENFORCEABLE AGREEMENTS*

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I. INTRODUCTION

Conflicts between employees and employers are nothing new. Thirty years ago, most of these conflicts were resolved, if at all, through the grievance procedure of a union-negotiated collective bargaining agreement. This procedure culminated in binding arbitration before an arbitrator or panel of arbitrators chosen jointly by the company and the union. A conflict resolved in this way would never see the inside of a courtroom.

Recently, however, union membership has declined sharply,[1] resulting in a much smaller percentage of employees who can avail themselves of union-negotiated grievance procedures. At the same time, Congress and the courts have decided that unions are unable to provide employees with the minimal terms of employment that employees have the right to expect.[2] Congress therefore has passed legislation, and courts have modified long-standing judicial doctrines, to establish threshold terms of employment which protect employees regardless of whether they are members of a union. This trend began slowly with the passage of the Fair Labor Standards Act,[3] picked up steam when Title VII[4] was passed in 1964, and continues strong today, as evidenced by such recent statutes as the Family and Medical Leave Act,[5] the Americans with Disabilities Act,[6] and the Civil Rights Act of 1991.[7]

These new minimum terms of employment are called "individual rights,"[8] because the individual employee, rather than a union, is responsible for their enforcement. Unlike the grievance mechanism of a

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[1]*See, e.g.*, Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 578-84 (1992).

[2]*See id.* at 588-93.

[3]29 U.S.C. §§ 201-19 (1988 & Supp. V 1993).

[4]42 U.S.C. § 2000e-2 (1988 & Supp. V 1993).

[5]29 U.S.C. §§ 2601-54 (Supp. V 1993).

[6]42 U.S.C. §§ 12101-213 (Supp. V 1993).

[7]Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.).

[8]For general discussions concerning individual rights, see Richard A. Bales, *A New Direction for American Labor Law: Individual Autonomy and the Compulsory Arbitration of Individual Employment Rights*, 30 HOUS. L. REV. 1863, 1874-81 (1994); Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment at Will: The Case Against "Tortification" of Labor and Employment Law*, 74 B.U. L. REV. 387, 421-27 (1994); Robert J. Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 U.S.F. L. REV. 169, 174-87 (1991); Stone, *supra* note 1, at 584-93; Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 11-14 (1988).

collective bargaining agreement, in which conflicts are resolved jointly by employer and union without judicial interference, individual rights depend for enforcement upon lawsuits brought by employees against employers. The number of such lawsuits has exploded recently,[9] as press coverage of highly-publicized cases (especially those involving sexual harassment) has made employees aware of their rights and of the possibility of receiving large damage awards.

Not everyone, however, is enamored with the idea of enforcing these new individual employment rights through litigation. Judges see the employment litigation explosion adding to the backlog that forces litigants to wait for years before getting to trial[10] and find that many employment cases, although cast as complaints of prohibited discrimination, are in reality grievances against perceived unfairness. Employers dislike the jury system because they believe that juries are unpredictable, that jurors often decide cases on the basis of sympathy rather than legal merit, and that jurors are "the 'peers' of employees, not employers."[11] Employees, especially lower-income employees, feel shut out of the entire process, because their low salaries make it unlikely that they will receive large damage awards, and it is extremely difficult to attract an attorney who will handle the case on a contingency basis.[12] For these reasons, employers and employees are increasingly entering into,[13] and courts are increasingly enforcing, compulsory arbitration agreements.[14]

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[9]The EEOC currently has a backlog of almost 88,000 claims, 99.5% of which it will not litigate on behalf of the claimant. U.S. GAO REPORT, EEOC'S EXPANDING WORKLOAD: INCREASES IN AGE DISCRIMINATION AND OTHER CHANGES CALL FOR A NEW APPROACH, GAO/HEHS-94-32, at 13 (February 9, 1994).

[10]Bales, *supra* note 8, at 1879-80.

[11]*See* Rick Bales & Reagan Burch, *The Future of Employment Arbitration in the Nonunion Sector*, 45 LAB. L.J. 627, 633 (1994).

[12]*See* Duffy, *supra* note 8, at 423; William B. Gould, IV, *Stemming the Wrongful Discharge Tide: A Case for Arbitration*, 13 EMPLOYEE REL. L.J. 404, 413-14 (1988); Eric Schnapper, *Advocates Deterred by Fee Issues*, NAT'L L.J., Mar. 28, 1994, at C1. Additionally, the adversarial litigation process forces employees to jeopardize or sever their current employment relationship; to pay for an attorney's retainer, expert witness fees, and protracted discovery; and to put their lives on hold for years.

[13]*See* Margaret A. Jacobs, *Rulings Show Judges Are Growing Skeptical of Mandatory Arbitration*, WALL ST. J., Dec. 22, 1994, at B2.

[14]For other articles discussing compulsory arbitration, see generally Bales, *supra* note 8; Bales & Burch, *supra* note 11; Christine G. Cooper, *Where Are We Going with* Gilmer*?—Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203 (1992); Matthew W. Finkin, *Commentary on "Arbitration of Employment Disputes Without Unions,"* 66 CHI.-KENT L. REV. 799 (1990); Paul F. Gerhart & Donald P. Crane, *Wrongful*

A compulsory arbitration agreement is defined as a prospective agreement between employer and employee to resolve future employment disputes by binding arbitration. Compulsory arbitration provisions can be created as stand-alone agreements or they can be inserted as part of broader written employment agreements. They can be broad enough to encompass virtually every employment dispute imaginable, or they can be

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Dismissal Arbitration and the Law, 48 ARB. J. 56 (June 1993); Marshall W. Grate, *Binding Arbitration of Statutory Employment Discrimination Claims*, 70 U. DET. MERCY L. REV. 699 (1993); John A. Gray, *Have the Foxes Become the Guardians of the Chickens? The Post*-Gilmer *Legal Status of Predispute Mandatory Arbitration as a Condition of Employment*, 37 VILL. L. REV. 113 (1992); Patrick O. Gudridge, *Title VII Arbitration*, 16 BERKELEY J. EMPLOY. & LAB. L. 209 (1995); Stephen L. Hayford & Michael J. Evers, *The Interaction Between the Employment-At-Will Doctrine and Employer-Employee Agreements to Arbitrate Statutory Fair Employment Practices Claims: Difficult Choices for At-Will Employers*, 73 N.C. L. REV. 443 (1995); William M. Howard, *Arbitrating Employment Discrimination Claims: Do You* Really *Have To? Do You* Really *Want To?*, 43 DRAKE L. REV. 255 (1994); James A. King, Jr. et al., *Agreeing to Disagree on EEO Disputes*, 9 LAB. LAW 97, 98 (1993); Martin H. Malin & Robert F. Ladenson, *Privitizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the* Steelworkers Trilogy *to* Gilmer, 44 HASTINGS L.J. 1187 (1993); Christopher S. Miller & Brian S. Poe, *Arbitrating Employment Claims: The State of the Law*, 46 LAB. L.J. 195 (1995); Gerard Morales & Kelly Humphrey, *The Enforceability of Agreements to Arbitrate Employment Disputes*, 43 LAB. L.J. 663, 669 (1992); Thomas J. Piskorski & David B. Ross, *Private Arbitration as the Exclusive Means of Resolving Employment-Related Disputes*, 19 EMPLOYEE REL. L.J. 205 (1993); Robert A. Shearer, *The Impact of Employment Arbitration Agreements on Sex Discrimination Claims: The Trend Toward Nonjudicial Resolution*, 18 EMPLOYEE REL. L.J. 479 (1992); G. Richard Shell, *ERISA and Other Federal Employment Statutes: When Is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 TEX. L. REV. 509 (1990); R. Gaull Silberman et al., *Alternative Dispute Resolution of Employment Discrimination Claims*, 54 LA. L. REV. 1533 (1994); Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. DISP. RESOL. 259; Todd H. Thomas, *Using Arbitration to Avoid Litigation*, 44 LAB. L.J. 3 (1993); Heidi M. Hellekson, Note, *Taking the "Alternative" Out of the Dispute Resolution of Title VII Claims: The Implications of a Mandatory Enforcement Scheme of Arbitration Agreements Arising Out of Employment Contracts*, 70 N.D. L. REV. 435 (1994); Michael G. Holcomb, Note, *The Demise of the FAA's "Contract of Employment" Exception?*, 1992 J. DISP. RESOL. 213; Michael Lieberman, Comment, *Overcoming the Presumption of Arbitrability of ADEA Claims: The Triumph of Substantive Over Procedural Values in* Nicholson v. CPC International, Inc., 138 U. PA. L. REV. 1817 (1990); Patrick D. Smith, Comment, *Arbitration—The Court Opens the Door to Arbitration of Employment Disputes:* Gilmer v. Interstate/Johnson Lane Corp., 17 J. CORP. L. 865 (1992); Jennifer A. Magyar, Comment, *Statutory Civil Rights Claims in Arbitration: Analysis of* Gilmer v. Interstate/Johnson Lane Corp., 72 B.U. L. REV. 641 (1992); Carol-Teigue J. Thomas, Comment, Gilmer v. Interstate/Johnson Lane Corporation: *When Is an Employee's Right to a Judicial Forum Precluded by an Arbitration Agreement?*, 27 NEW ENG. L. REV. 791 (1993); Note, *Agreements to Arbitrate Claims Under the Age Discrimination in Employment Act*, 104 HARV. L. REV. 568 (1990).

drawn narrowly to encompass only a limited range of disputes (such as those involving discharge from employment). They can incorporate rules to govern arbitral procedure, or they can adopt the rules promulgated by a neutral agency such as the American Arbitration Association (AAA) or the Center for Public Resources (CPR). The primary distinctive feature of a compulsory arbitration agreement is that both parties, the employer and the employee, agree to submit to binding arbitration any employment dispute that arises in the future.

Informal information from employers who have instituted dispute resolution procedures culminating in arbitration indicates that large numbers of disputes have been resolved successfully, most cases being settled short of arbitration. Successful programs have received little, if any, publicity. In a small number of cases, employees[15] have filed suits seeking to avoid arbitration and, instead, to litigate an employment dispute. Employees' efforts to avoid arbitration have resulted in attention by the media and members of Congress. Most reported cases have resulted in decisions enforcing the arbitration requirement. In any given case, however, the court's decision is likely to be influenced heavily by the court's perception of the fairness of the underlying arbitration agreement. If the court perceives the agreement as unfair in some way, it is likely to allow the employee to pursue her claim through litigation.[16] Some of the major "open issues" regarding compulsory arbitration, then, involve defining the minimum components that a compulsory arbitration agreement must possess to ensure judicial enforcement.

This Article attempts to identify and illustrate those minimum components. Part II discusses the emergence of compulsory arbitration as an alternative to litigation in the resolution of employment disputes. Part III examines various grounds upon which existing compulsory arbitration agreements have been challenged. Part IV summarizes the minimum components that compulsory arbitration agreements must possess to ensure judicial enforcement.

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[15]Although generally it is the employee who seeks to deny enforcement of an arbitration agreement, occasionally an employer does the same. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McCollum, 666 S.W.2d 604, 605 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.), *cert. denied*, 469 U.S. 1127 (1985).

[16]*See, e.g.*, Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299, 1305 (9th Cir. 1994) (refusing to compel arbitration where court found employee did not "knowingly" agree to submit her employment disputes to binding arbitration).

II. THE EMERGENCE OF COMPULSORY ARBITRATION

A. The Steelworkers' *Trilogy and Early Arbitration of Statutory Rights*

In the 1960 *Steelworkers'* Trilogy, the Supreme Court strongly endorsed arbitration as a mechanism for resolving industrial disputes arising under collective bargaining agreements.[17] This endorsement in the context of collective bargaining, however, did not carry over to the context of resolving statutory claims by arbitration. In *Wilko v. Swan*,[18] a case decided before the *Steelworkers'* Trilogy, the Court held that a claim under section 12(2) of the Securities Act of 1933[19] was nonarbitrable because the Court doubted arbitration's ability to adequately resolve statutory claims.[20] After the *Steelworkers'* Trilogy, lower federal courts continued to apply *Wilko* to attempts to arbitrate statutory claims,[21] creating a rigid divide between arbitrable collective bargaining issues and nonarbitrable statutory issues. The continued nonarbitrability of statutory issues was premised on the assumption that: (1) a judicial forum was superior to arbitration for enforcing statutory rights; (2) compulsory arbitration constituted a waiver of one's statutory right to a judicial forum, and this contravened public policy; and (3) the informality of arbitration made it difficult for courts to correct errors in statutory interpretation.[22]

B. Alexander v. Gardner-Denver Co.

Alexander v. Gardner-Denver Co.[23] involved a statutory claim, seemingly nonarbitrable under *Wilko*, that an employer argued was

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[17]United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

[18]346 U.S. 427 (1953).

[19]15 U.S.C. § 771(2) (1988).

[20]346 U.S. at 436.

[21]*See* Holcomb, *supra* note 14, at 216; G. Richard Shell, *The Role of Public Law in Private Dispute Resolution: Reflections on* Shearson/American Express, Inc. v. McMahon, 26 AM. BUS. L.J. 397, 404 (1988); Romyn v. Shearson Lehman Bros., 648 F. Supp. 626, 632 (D. Utah 1986) (applying to RICO action); Breyer v. First Nat'l Monetary Corp., 548 F. Supp. 955, 959 (D.N.J. 1982) (applying to Commodities Exchange Act); Aimcee Wholesale Corp. v. Tomar Prod., Inc., 237 N.E.2d 223, 225 (N.Y. 1968) (applying to Sherman Antitrust Act).

[22]American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 827 (2d Cir. 1968); Hunt v. Mobil Oil Corp., 444 F. Supp. 68, 70-71 (S.D.N.Y. 1977).

[23]415 U.S. 36 (1974).

arbitrable pursuant to the terms of a collective bargaining agreement and the *Steelworkers'* Trilogy presumption of arbitrability.[24] The employee alleged that he was discharged because of race;[25] the employer claimed the discharge was justified because of poor work performance.[26] The employee, who was unionized and covered by a collective bargaining agreement,[27] filed both a grievance and a Title VII action.[28] After an arbitrator ruled in favor of the employer on the grievance, the employer moved for summary judgment on the Title VII action.[29] The district court, holding that the employee was bound by the arbitral decision and thereby precluded from suing his employer under Title VII, granted summary judgment, and the Tenth Circuit affirmed.[30]

The Supreme Court reversed, holding that an employee does not forfeit her Title VII discrimination claim by first pursuing a grievance to final arbitration under the nondiscrimination clause of a collective bargaining agreement.[31] The Court presented four reasons why labor arbitration was inappropriate for the final resolution of Title VII claims. First, the Court stated that labor arbitrators have neither the experience[32] nor the authority[33] to resolve Title VII claims. Second, the Court, noting the relative informality of arbitration hearings as compared to judicial proceedings, stated that arbitral fact-finding procedures were inadequate to protect employees' Title VII rights.[34] Third, the Court pointed out that arbitrators were under no obligation to provide the Court with an explanation of the reasons for an award.[35] Fourth, the Court noted the union's exclusive control over the manner and extent to which an employee's grievance is presented.[36] The Court was concerned about potential conflicts of interest

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[24] *Id.* at 45-47.

[25] *Id.* at 42.

[26] *Id.* at 38.

[27] *Id.* at 39.

[28] *Id.* at 42-43.

[29] *Id.* at 43.

[30] *Id.*

[31] *Id.* at 49.

[32] *Id.* at 57.

[33] *Id.* at 53-54 (stating that the arbitrator has authority to resolve only questions of contractual rights, but not statutory rights).

[34] *Id.* at 57-58 (noting that the record is often incomplete; that rules of evidence do not apply; and that discovery, compulsory process, cross-examination, and testimony under oath are often severely limited or unavailable).

[35] *Id.* at 58.

[36] *Id.* at 58 n.19.

that might cause a union to not adequately pursue an employee's discrimination claim.[37]

After *Gardner-Denver*, the Court employed similar reasoning to hold that a collective bargaining agreement's compulsory arbitration clause would not preclude a subsequent suit to enforce the Fair Labor Standards Act,[38] section 1983 of the Civil Rights Act of 1871,[39] or the Federal Employers' Liability Act.[40] Several circuit courts also extended the *Gardner-Denver* analysis by holding that compulsory arbitration clauses contained in individual employment contracts would not preclude subsequent suits under anti-discrimination laws.[41]

C. *The Federal Arbitration Act and the* Mitsubishi *Trilogy*

While post-*Gardener-Denver* courts continued to deny compulsory arbitration of statutory claims in the employment context, the Supreme Court subsequent to *Gardner-Denver* handed down three decisions approving compulsory arbitration of statutory claims arising under antitrust,[42] securities,[43] and racketeering[44] laws. These cases (the *Mitsubishi* Trilogy) were predicated on the Federal Arbitration Act (FAA or Act),[45] which creates a body of federal substantive law enforcing

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[37]*Id.*

[38]Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 745 (1981).

[39]McDonald v. City of West Branch, 466 U.S. 284, 292 (1984) (enforcing 42 U.S.C. § 1983 (1988)).

[40]Atchison, Topeka & Santa Fe Ry. v. Buell, 480 U.S. 557, 570-71 (1987) (enforcing Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1988)).

[41]Utley v. Goldman Sachs & Co., 883 F.2d 184, 187 (1st Cir. 1989) (enforcing Title VII), *cert. denied*, 493 U.S. 1045 (1990); Swenson v. Management Recruiters Int'l, Inc., 858 F.2d 1304, 1309 (8th Cir. 1988) (enforcing Title VII), *cert. denied*, 493 U.S. 848 (1989). *But see* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991) (holding that an ADEA claim can be subjected to compulsory arbitration); Pihl v. Thompson McKinnon Sec., 48 Fair Empl. Prac. Cas. (BNA) 922, 924-26 (E.D. Pa. 1988) (holding that ADEA claims are subject to compulsory arbitration).

[42]Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 640 (1985) (compelling enforcement of a private contract to arbitrate claims arising under the Sherman Antitrust Act).

[43]Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 483 (1989) (compelling enforcement of a private contract to arbitrate claims arising under section 12(2) of the Securities Act of 1933).

[44]Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 242 (1987) (compelling enforcement of a private contract to arbitrate claims arising under both RICO and section 10(b) of the Securities Act of 1934).

[45]9 U.S.C. §§ 1-307 (1988 & Supp. V 1993).

agreements to arbitrate in connection with transactions involving commerce.[46]

In the *Mitsubishi* Trilogy, the Court interpreted the FAA as creating a presumption of arbitrability: the Court will presume that Congress did not intend to prohibit arbitration of statutory claims unless the language of the statute in question expressly indicates otherwise.[47] Additionally, the Court explicitly rejected arguments questioning the competence of arbitrators and the sufficiency of arbitral procedures.[48] In this context of the Court's increasing confidence in arbitral resolution of statutory claims, the Court granted certiorari in *Gilmer v. Interstate/Johnson Lane Corp.*[49]

D. Gilmer v. Interstate/Johnson Lane Corp.

Interstate/Johnson Lane Corporation (Interstate) discharged Robert Gilmer from his position as manager of financial services. A condition of his employment had been to register with several stock exchanges, including the New York Stock Exchange (NYSE).[50] The NYSE registration application contained a clause by which the applicant "agree[d] to arbitrate any dispute, claim or controversy" between the applicant and his employer "arising out of the employment or termination of employment of" the applicant.[51]

Gilmer filed an EEOC charge and then a civil suit alleging that Interstate fired him because of his age in violation of the Age Discrimination in Employment Act.[52] Interstate moved to compel arbitration, and the district court, relying on *Gardner-Denver*, denied the motion.[53] The Fourth Circuit reversed, finding "nothing in the text, legislative history, or underlying purposes of the ADEA indicating a congressional intent to preclude enforcement of arbitration agreements."[54]

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[46]The FAA permits a party to obtain a stay of litigation when an issue is referable to arbitration or to obtain an order compelling arbitration when one party has refused to comply with an arbitration agreement. *Id.* §§ 3, 4.

[47]Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

[48]*See, e.g., id.* at 628 ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits their resolution in an arbitral, rather than a judicial, forum."); *McMahon*, 482 U.S. at 232 ("[T]he streamlined procedures of arbitration do not entail any consequential restriction on substantive rights.").

[49]500 U.S. 20, 24-25 (1991).

[50]*Id.* at 23.

[51]*Id.* (quoting Appendix to Respondents' Brief at 1, 18).

[52]*Id.* at 23-24; 29 U.S.C. §§ 621-34 (1988 & Supp. V 1994).

[53]*Gilmer*, 500 U.S. at 24.

[54]Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195, 197 (4th Cir. 1990).

On appeal, the Supreme Court considered four broad arguments for Gilmer's claim that the compulsory arbitration clause should not preclude his ADEA suit. First, Gilmer argued that *Gardner-Denver* compelled the conclusion that an individual could not, via an arbitration agreement, waive the right to bring a statutory employment claim in a judicial forum.[55] Second, Gilmer argued that compulsory arbitration was inconsistent with the statutory purposes and framework of the ADEA and that this rebutted the presumption of arbitrability created by the *Mitsubishi* Trilogy.[56] Third, Gilmer argued that the arbitral forum was inadequate to protect statutory employment rights.[57] Additionally, several amici curiae argued that an FAA provision excluding "contracts of employment" rendered the FAA (and its presumption of arbitrability) inapplicable to his case.[58] The Supreme Court rejected all four arguments and held that the FAA entitled Interstate to compel arbitration of Gilmer's age discrimination claims.[59]

1. *Gardner-Denver* Distinguished

Gilmer argued that *Gardner-Denver* protected his right to litigate rather than arbitrate his ADEA claim.[60] However, the Court distinguished the *Gardner-Denver* decision from Gilmer's case in three ways.

First, the Court noted that because a labor arbitrator's authority is limited to resolving conflicts in interpretation of the collective bargaining agreement at issue, a labor arbitrator—such as the one that decided the plaintiff's case in *Gardner-Denver*—lacked the authority to resolve statutory claims.[61] Gilmer, on the other hand, was not covered by a collective bargaining agreement, and the arbitrator who would decide his case would be given explicit authority to resolve any dispute, claim, or controversy arising out of Gilmer's employment.[62]

The Court's second basis for distinguishing *Gardner-Denver* was that Gilmer—unlike the plaintiff in *Gardner-Denver*—was not dependent on a union to enforce his statutory claims.[63] Gilmer was not covered by a collective bargaining agreement and hence did not depend on the goodwill

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[55]*Gilmer*, 500 U.S. at 33-34.

[56]*Id.* at 27.

[57]*Id.* at 30.

[58]*Id.* at 25 n.2; *see also id.* at 36 (Stevens, J., dissenting).

[59]*Id.* at 27-35.

[60]*Id.* at 33.

[61]*Id.* at 34.

[62]*See id.* at 35.

[63]*Id.*

of a union to provide adequate representation at the arbitration hearing.[64] Thus, the Court concluded that the tension in *Gardner-Denver* between collective representation and individual rights did not apply to Gilmer's case.[65]

Third, the Court noted that *Gardner-Denver* was not decided under the FAA.[66] Citing *Mitsubishi*, the Court imported the presumption of arbitrability from the commercial arbitration context of the *Mitsubishi* Trilogy to the non-collective bargaining agreement context of *Gilmer*.[67] Because the Court distinguished *Gardner-Denver*, the case was not explicitly overruled. However, it is unclear how a court would decide *Gardner-Denver* today if an employer were to argue that the reasoning behind *Gilmer* applies to the collective bargaining context.[68]

2. Arbitral Consistency with Individual Rights Statutes

Gilmer's second argument was that compulsory arbitration is inconsistent with the statutory framework and the purposes of the ADEA.[69] This inconsistency, he claimed, rebutted the *Mitsubishi* Trilogy's presumption of arbitrability. Gilmer advanced four reasons why compulsory arbitration defeated the Congressional purposes underlying the ADEA.

First, he contended that compulsory arbitration subverted the Congressional goal of furthering important social policies.[70] The Court rejected this argument, finding that the arbitral forum was adequate to protect these social policies.[71] Second, Gilmer argued that compulsory arbitration would "undermine the role of the EEOC in enforcing the ADEA."[72] The Court disagreed, reasoning that an arbitration agreement

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[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *See* Block v. Art Iron, Inc., 866 F. Supp. 380, 383-87 (N.D. Ind. 1994) (following *Gardner-Denver* and holding that an arbitration provision in a collective bargaining agreement cannot require an employee to arbitrate individual statutory claims); Claps v. Moliterno Stone Sales, Inc., 819 F. Supp. 141, 147 (D. Conn. 1993) (following *Gardner-Denver* and distinguishing *Gilmer*). *Contra* Austin v. Owens-Brockway Glass Container, Inc., 844 F. Supp. 1103, 1106-07 (W.D. Va. 1994) (following *Gilmer* and enforcing arbitration of a discrimination claim under the arbitration clause in a collective bargaining agreement).

[69] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 27 (1991).

[70] *Id.* at 27.

[71] *Id.* at 28 (referring to the *Mitsubishi* Trilogy cases).

[72] *Id.*

would not preclude an employee from filing an EEOC charge, and thus did not shut the EEOC out of the dispute resolution process.[73]

Third, Gilmer argued that compulsory arbitration subverted Congressional intent to provide victims of discrimination with a judicial forum.[74] The Court also rejected this argument, finding that nothing in the text or legislative history of the ADEA expressly demonstrated Congressional intent to preclude compulsory arbitration.[75]

Finally, Gilmer argued that compulsory arbitration agreements should not be enforced because they often are the product of employer coercion, which results from the unequal bargaining power between employers and employees.[76] The Court flatly rejected this argument, stating: "Mere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."[77] Instead, the Court held that such agreements would be enforced in the absence of "the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract,'"[78] and that "claim[s] of unequal bargaining power [are] best left for resolution in specific cases."[79]

3. Arbitral Adequacy

Gilmer further asserted as an argument against compulsory arbitration of his claim that arbitration procedures in general and the NYSE arbitration procedures in particular were inadequate to protect statutory employment rights because of their informality.[80] Part III of this Article discusses the issues that this argument raises.

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[73] *Id.* The Court gave three additional reasons for its conclusion. First, it argued that Gilmer's argument was non-unique: that voluntary settlement of ADEA claims also shuts the EEOC out of the dispute resolution process. *Id.* Second, the Court asserted, "[N]othing in the ADEA indicates that Congress intended that the EEOC be involved in all employment disputes." *Id.* Third, the Court, citing the *Mitsubishi* Trilogy and the Securities Exchange Commission's involvement in enforcing securities statutes, stated, "[T]he mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude [compulsory] arbitration." *Id.* at 28-29.

[74] *Id.* at 29.

[75] *Id.*

[76] *Id.* at 32-33.

[77] *Id.* at 33.

[78] *Id.* (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985)). Indeed, the Court's recognition that Gilmer was "an experienced businessman," *Id.* at 33, suggests that it will be nearly impossible for white collar employees to make such a showing.

[79] *Gilmer*, 500 U.S. at 33.

[80] *Id.* at 31-32.

4. The FAA "Contracts of Employment" Exclusion

In addition to Gilmer's arguments, the Court received several amici curiae contending that an FAA provision that excluded employment contracts rendered the FAA—and its presumption of arbitrability—inapplicable to this case.[81] Section 1 of the FAA, the definition section, states: "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[82] The majority noted that Gilmer had not presented this argument in the lower courts nor in the petition for certiorari.[83] Nevertheless, the Court considered the argument as raised by several amici curiae and concluded that because the arbitration agreement was contained in Gilmer's registration application with the NYSE, it was not part of his employment contract with Interstate.[84]

Some commentators have argued that both the "plain meaning"[85] and the legislative history[86] of the FAA compel courts to construe the "contracts of employment" exception to exclude all employment contracts. If courts accept this argument, *Gilmer* becomes a very narrow decision applicable only to employees in the securities industry whose arbitration agreement is contained not in their formal employment contract, but rather in their registration application with the NYSE.[87] However, nearly every court that has considered the issue has interpreted the clause to exclude only those workers directly involved in interstate commerce, such as truck

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[81] *Id.* at 25 n.2; *see also id.* at 36 (Stevens, J., dissenting).

[82] 9 U.S.C. § 1 (1988).

[83] *Gilmer*, 500 U.S. at 25 n.2.

[84] *Id.*

[85] Cooper, *supra* note 14, at 226, 234.

[86] *Id.* at 226-29; Holcomb, *supra* note 14, at 220; Magyar, *supra* note 14, at 653.

[87] Slawsky v. True Form Founds., No. 91-1822, 1991 WL 98906, at *1 (E.D. Pa. 1991) (distinguishing *Gilmer* because the plaintiff's compulsory arbitration clause was located in a "'contract of employment' that is exempt from the FAA"). With the exception of *Slawsky*, the post-*Gilmer* federal cases have avoided this issue the same way the Court in *Gilmer* did—by arguing that because the arbitration agreements at issue were contained in the plaintiffs' registration applications with the NYSE, the agreements were not part of a "contract of employment." *See, e.g.*, Bierdeman v. Shearson Lehman Hutton, Inc., No. 90-16024, 1992 WL 112255, at *1, *reported without opinion*, 963 F.2d 378 (9th Cir.), *cert. denied*, 113 S. Ct. 328 (1992); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 311 (6th Cir. 1991); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 230 (5th Cir. 1991). The courts thus have not yet had to confront the issue of whether the FAA may be used to compel arbitration where the arbitration agreement is contained in an employment contract.

drivers.[88] Even if courts ultimately interpret the FAA exception broadly so as to exclude all employment contracts, compulsory arbitration agreements may nevertheless be enforceable by means of state arbitration statutes, some of which do not contain a "contracts of employment" exclusionary clause.[89]

5. Applicability of the FAA and *Gilmer* to Other Employment Laws

Because Gilmer brought only an ADEA claim, the Court did not address the extent to which the *Gilmer* holding applies to other employment laws. Since *Gilmer*, the Fifth,[90] Sixth,[91] Ninth,[92] Tenth,[93] and Eleventh[94] Circuits have all held that Title VII claims are subject to compulsory arbitration.[95] The Supreme Court's treatment of one of these cases, *Alford v. Dean Witter Reynolds, Inc.*, suggests that the Supreme Court will agree with the extension of *Gilmer* to claims under Title VII and other employment-related statutes.[96]

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[88]*See, e.g.*, American Postal Workers Union v. United States Postal Serv., 823 F.2d 466, 473 (11th Cir. 1987); Stokes v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 523 F.2d 433, 436 (6th Cir. 1975); Dickstein v. duPont, 443 F.2d 783, 785 (1st Cir. 1971); Signal-Stat Corp. v. Local 475, United Elec., Radio & Mach. Workers, 235 F.2d 298, 303 (2d Cir. 1956), *cert. denied*, 354 U.S. 911, *reh'g denied*, 355 U.S. 852 (1957); Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers, Local 437, 207 F.2d 450, 452 (3d Cir. 1953); Weston v. ITT-CFC, No. 3:92-CV-2044-H, 1992 WL 473846, at *1 (N.D. Tex. Dec. 3, 1992); Malison v. Prudential-Bache Sec., Inc., 654 F. Supp. 101, 104 (W.D.N.C. 1987); *see also* Southland Corp. v. Keating, 465 U.S. 1, 10-11 (1984) (holding that the FAA withdrew from the states the power to require resolution in a judicial forum of a claim which the parties had agreed to arbitrate, excepting arbitration agreements which are "part of a written maritime contract or a contract 'evidencing a transaction involving commerce'").

[89]*See* UNIF. ARB. ACT § 1 and F-1, 7 U.L.A. 1 (Supp. 1993). For a general discussion of the applicability of state arbitration statutes to employment claims, see Bales, *supra* note 8, at 1910-11.

[90]Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 230 (5th Cir. 1991).

[91]Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 307 (6th Cir. 1991).

[92]Nghiem v. NEC Elec., Inc., 25 F.3d 1437, 1441 (9th Cir.), *cert. denied*, 115 S. Ct. 638 (1994); Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932, 935 (9th Cir. 1992); Bierdeman v. Shearson Lehman Hutton, Inc., No. 90-16024, 1992 WL 112255, at *1, *reported without opinion*, 963 F.2d 378 (9th Cir.), *cert. denied*, 113 S. Ct. 328 (1992).

[93]Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482, 1487 (10th Cir. 1994).

[94]Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698, 700 (11th Cir. 1992).

[95]*See also* Williams v. Katten, Muchin & Zavis, 837 F. Supp. 1430, 1437 (N.D. Ill. 1993); Hull v. NCR Corp., 826 F. Supp. 303, 306 (E.D. Mo. 1993); DiCrisci v. Lyndon Guar. Bank, 807 F. Supp. 947, 952 (W.D.N.Y. 1992); Bender v. Smith Barney, Harris Upham & Co., 789 F. Supp. 155, 160 (D.N.J. 1992).

[96]939 F.2d 229, 230 (5th Cir. 1991). In *Alford*, a stockbroker who had signed an arbitration agreement similar to the one signed by Gilmer sued her employer in federal district court alleging

In addition to Title VII claims, courts following *Gilmer* have compelled arbitration of claims arising under the Americans with Disabilities Act,[97] the Fair Labor Standards Act,[98] the Employee Polygraph Protection Act,[99] the Employee Retirement Income Security Act,[100] the Equal Pay Act,[101] the Jury Systems Improvement Act[102] (forbidding employers from discriminating against employees because they have served on a jury), and 42 U.S.C. § 1981.[103] Citing *Gilmer*, courts also have held that certain employment claims created by state statutory and common law doctrines are subject to compulsory arbitration under the FAA.[104]

III. DESIGNING A COMPULSORY ARBITRATION PROVISION

As a result of *Gilmer* and its progeny, there appear to be no current legal impediments to the emergence of arbitration as the preeminent method of resolving employment disputes. However, courts are unlikely to enforce agreements that unfairly hinder an employee's ability to obtain redress for legitimate claims. Employees have challenged arbitration agreements on several grounds. These challenges have helped to define the minimum requirements of a valid, enforceable compulsory arbitration agreement.

A. Procedures for Selecting Arbitrators

One of the most pervasive criticisms of compulsory arbitration systems concerns the selection of arbitrators by a representative of the employer. That criticism has centered on the NYSE rules, under which Gilmer's case

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Title VII violations of sex discrimination and sexual harassment. The employer moved to dismiss the complaint and to compel arbitration. The district court denied the motion, and, relying on *Gardner-Denver*, the Fifth Circuit affirmed. On petition for certiorari, the Court vacated and remanded for further consideration in light of *Gilmer*. The Fifth Circuit then reversed its earlier decision, concluding, "Gilmer requires us to reverse the district court and compel arbitration of Alford's Title VII claim." *Id.* at 229-30.

[97]Solomon v. Duke Univ., 850 F. Supp. 372, 373 (M.D.N.C. 1993).

[98]Hampton v. ITT Corp., 829 F. Supp. 202, 204 (S.D. Tex. 1993).

[99]Saari v. Smith Barney, Harris Upham & Co., 968 F.2d 877, 881-82 (9th Cir.), *cert. denied*, 113 S. Ct. 494 (1992).

[100]Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1112 (3d Cir. 1993).

[101]Kinnebrew v. Gulf Ins. Co., 67 Fair Empl. Prac. Cas. (BNA) 189 (N.D. Tex. 1994).

[102]McNulty v. Prudential-Bache Sec., Inc., 871 F. Supp. 567, 571 (E.D.N.Y. 1994).

[103]Williams v. Katten, Muchin & Zavis, 837 F. Supp. 1430, 1437 (N.D. Ill. 1993).

[104]*See, e.g.*, Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698, 699 (11th Cir. 1992).

eventually was arbitrated. When *Gilmer* was decided, and for some time thereafter, the NYSE rules provided that the pool of potential arbitrators be appointed by the NYSE Director of Arbitration.[105] Allowing a representative of the employer to pick the pool from which arbitrators are selected presents an obvious source of concern about possible bias. This has led Professor Richard Shell to conclude that there is no effective way to screen securities industry arbitrators for bias, and that they may be "steeped in the kind of discriminatory biases the [employee] seeks to remedy."[106] Adding fuel to this fire, a General Accounting Office (GAO) study recently found that ninety-seven percent of security industry arbitrators are white, eighty-nine percent are male, and they have an average age of sixty.[107]

The Supreme Court rejected Gilmer's argument that arbitration of his discrimination claim should not be compelled because of the possibility

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[105]Similarly, the arbitral systems of major league sporting associations generally provide that the arbitration panel is presided over by the league commissioner. *See, e.g.*, Horne v. New England Patriots Football Club, Inc., 489 F. Supp. 465, 468 (D. Mass. 1980).

[106]Shell, *supra* note 14, at 569 n.437.

[107]GAO, *Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes*, GAO/HEHS-94-30, March 1994, at 8. Similarly, of the 50,000 neutrals on AAA panels, only six percent are women, and of the members of the National Academy of Arbitrators (consisting only of labor arbitrators), only seven percent are women. Dorissa Bolinski & David Singer, *Why Are So Few Women in the ADR Field?* ARB. J., Sept. 1993, at 61.

An interesting approach to challenging arbitral bias was taken by the plaintiff in Olson v. American Arbitration Assoc., Inc., 876 F. Supp. 850 (N.D. Tex. 1995). Plaintiff filed suit alleging intentional infliction of emotional distress in connection with her employment. Her employer filed a motion to compel arbitration based on the arbitration clause in her employment agreement. The trial court granted the motion. Before the arbitration hearing was held, plaintiff filed a second suit. This time she claimed that, in violation of the Texas Deceptive Trade Practices Act, the AAA had misrepresented to the public that it provided impartial arbitration services through neutral arbitrators. Specifically, she argued that the AAA's arbitration panels are biased in favor of employers because:

> (1) the panels are stacked with lawyers who primarily represent employers in employment disputes; (2) a vast majority of the panelists are men; (3) a vast majority of the panelists are white; (4) a vast majority of the panels are comprised of lawyers who do not represent a cross-section of society; and (5) the AAA receives substantial contributions from employers.

Id. at 852.

The employer filed a 12(b)(6) motion to dismiss for failure to state a claim. The court granted the motion. Noting that plaintiff's conclusion that her panel of arbitrators would be biased was "speculat[ion] based on stereotypical characteristics," the court held that even if plaintiff's allegations were true, they were insufficient by themselves to show bias. *Id.*

that his case ultimately would be decided by biased arbitrators. The Court noted that the NYSE rules under which Gilmer's case was arbitrated require that the parties be informed of the arbitrators' backgrounds, allow one peremptory challenge and unlimited challenges for cause, and require arbitrators to disclose "'any circumstances which might preclude [them] from rendering an objective and impartial determination.'"[108] The Court held that these procedural safeguards were sufficient to protect Gilmer from the possibility of biased arbitrators. Further, the Court indicated that the FAA, by providing that courts may overturn arbitration decisions "'[w]here there was evident partiality or corruption in the arbitrators,'" also protects employees from biased arbitrators.[109]

The Supreme Court's conclusion notwithstanding, the NYSE procedures for selecting arbitrators are subject to criticism in the context of employment discrimination disputes. Designed to resolve commercial disputes between brokers and customers as well as commission disputes between brokers and their firms, the securities industry system was not designed to resolve employment disputes and does not seem well suited to deal with them. For this reason, the securities industry wisely decided to reform its procedures for selecting arbitrators in employment cases. For example, the industry now recruits arbitrators with diverse backgrounds and provides arbitrators with additional training in employment discrimination law.[110]

At a minimum, compulsory arbitration procedures should ensure that employees and their attorneys have an equal opportunity to participate in the selection of arbitrators. Ideally, arbitrators should be chosen by mutual agreement or, alternatively, by use of a neutral source of nominations of potential disinterested arbitrators. This is the method by which arbitrators have been chosen successfully for many years in the collective bargaining agreement context.[111] In the non-union context, the

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[108]Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30 (1991) (quoting NYSE arbitration rules).

[109]*Id.* (quoting 9 U.S.C. § 10(b)); *see also* Saari v. Smith Barney, Harris Upham & Co., Inc., 968 F.2d 877, 882 (9th Cir.), *cert. denied*, 113 S. Ct. 494 (1992). In *Saari*, an employee sought to avoid enforcement of his employment arbitration agreement on the ground that, because the panel of arbitrators would be drawn from the securities industry, the arbitrators would necessarily be biased. The Ninth Circuit disagreed, stating, "'[M]istrust of the arbitral process' was clearly rejected as a reason for avoiding arbitration by the Court in *Gilmer*." *Id.* at 882 (quoting *Gilmer*, 500 U.S. at 34 n.5).

[110]*See* Jacobs, *supra* note 13, at B5; N.A.S.D. Notice to Members 93-64 (September 1993).

[111]*See* FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 135 (4th ed. 1985).

American Arbitration Association (AAA) and the Center for Public Resources (CPR) are available to nominate proposed arbitrators. In *Williams v. Katten, Muchin & Zavis*,[112] the arbitration agreement at issue provided that if the parties were unable to agree upon an arbitrator within sixty days after a dispute arose, an arbitrator was to be chosen according to AAA rules. The court upheld this procedure against an employee's claim of bias.[113]

B. Discovery

Another criticism leveled at compulsory arbitration in *Gilmer* and elsewhere is that arbitral discovery is more limited than judicial discovery, and that this compromises an employee's ability to prove discrimination. Proving disparate treatment without discovery would be difficult because a plaintiff bringing such a case must prove that she was treated differently than other similarly-situated non-class members;[114] she therefore must discover evidence of how those non-class members were treated.[115] Proving disparate impact[116] would be impossible[117] without the opportunity

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[112]837 F. Supp. 1430 (N.D. Ill. 1993).

[113]*Id.* at 1439-40. The compulsory arbitration clause at issue in *Williams* specified that an arbitrator was to be chosen according to the AAA Labor Arbitration Rules. Rule 17 of the AAA Labor Arbitration Rules, as amended January 1, 1992, provides:

> No person shall serve as a neutral arbitrator in any arbitration under these rules in which that person has any financial or personal interest in the result of the arbitration. Any prospective or neutral arbitrator shall immediately disclose any circumstance likely to affect impartiality, including any bias or financial or personal interest in the result of arbitration. Upon receipt of this information from the arbitrator or any other source, the AAA shall communicate the information to the parties and . . . [u]pon objection of a party to the continued service of a neutral arbitrator, the AAA, after consultation with the parties and the arbitrator, shall determine whether the arbitrator should be disqualified and shall inform the parties of its decision, which shall be conclusive.

Id. at 1439-40 n.13 (alterations in original).

The AAA's Labor Arbitration Rules were designed for use in the collective bargaining context. The AAA has designed a separate but similar set of rules for use in the non-collective bargaining agreement employment context, the AAA Employment Dispute Resolution Rules. Rule 8(c) of the AAA Employment Dispute Resolution Rules, which covers the selection of arbitrators, is virtually identical to the labor arbitration rule at issue in *Williams*. AMERICAN ARBITRATION ASSOCIATION, EMPLOYMENT DISPUTE RESOLUTION RULES § 8(c) at 13 (Nov. 1, 1993).

[114]*See* St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2747-48 (1993).

[115]Cooper, *supra* note 14, at 218.

[116]*See generally* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

to obtain from an employer statistical information about the employment practice in question.[118]

The NYSE rules which the *Gilmer* Court approved permitted "document production, information requests, depositions, and subpoenas."[119] The Court, after noting the availability of such discovery, observed that, "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'"[120] In *Williams v. Katten, Muchin & Zavis*,[121] the arbitration agreement incorporated by reference AAA discovery rules.[122] The employee argued that the AAA rules inadequately protected her statutory rights because they did not contain any provision specifically permitting or denying discovery.[123] The court noted, however, that the AAA rules "authorize an arbitrator to subpoena witnesses and documents either independently or upon request of a party."[124] The court held that this was sufficient to protect the employee's right to obtain discovery.[125]

Because the rules at issue in *Gilmer* explicitly permitted a significant range of discovery, it is unclear whether courts will require explicit discovery rules as a condition precedent to enforcing employment arbitration agreements and, if so, the nature and breadth of discovery rules that may be found sufficient. To ensure enforcement, arbitration procedures ideally should specifically permit at least the types of discovery to which the Supreme Court referred in *Gilmer*. Alternatively, agreements should incorporate by reference the AAA's Employment Dispute Resolution Rules.

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[117]Cooper, *supra* note 14, at 218.

[118]*See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650-51 (1989).

[119]Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991).

[120]*Id.* (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

[121]837 F. Supp. 1430 (N.D. Ill. 1993).

[122]*Id.* at 1439. The AAA rules for employment dispute resolution similarly do not contain any provision specifically permitting or denying discovery. They do, like the labor arbitration rules, permit an arbitrator to subpoena witnesses and documents either independently or upon request of a party. AMERICAN ARBITRATION ASSOCIATION, EMPLOYMENT DISPUTE RESOLUTION RULES § 19 at 16 (Nov. 1, 1993).

[123]*Williams*, 837 F. Supp. at 1439.

[124]*Id.*

[125]*Id.*

C. Written Opinions

In *Gilmer*, the plaintiff argued that arbitration could not adequately protect employees' statutory rights because employment arbitrators are not required to issue written opinions.[126] This, Gilmer argued, would result in the public being unaware of employers' discrimination policies.[127] It also, he argued, would hamper effective appellate review[128] and stifle development of the law.[129]

The *Gilmer* Court held that these concerns did not justify denying enforcement of Gilmer's compulsory arbitration agreement. First, the Court pointed out that NYSE rules require arbitrators to issue written, detailed opinions and to make those opinions publicly available.[130] Second, the Court reasoned that courts would continue to issue judicial opinions because not all employers and employees are likely to sign binding arbitration agreements.[131] Third, the Court discounted the uniqueness of Gilmer's argument, noting that settlement agreements, which are encouraged by the ADEA and other federal antidiscrimination statutes, similarly fail to produce written opinions.[132]

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[126]Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31-32 (1991); *see also* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598 (1960) (noting that arbitrators "have no obligation to the court to give their reasons for an award"); GEORGE GOLDBERG, A LAWYER'S GUIDE TO COMMERCIAL ARBITRATION 62 (1977).

[127]*Gilmer*, 500 U.S. at 32. One commentator described this problem as follows:

> Imagine a sexual harassment case in private arbitration. If the arbitrator ruled that the employer did not perform an adequate investigation of the sexual harassment complaint, who will learn what kind of investigation should have been performed? Indeed, in the typical commercial arbitration, where arbitrators are discouraged from writing opinions containing findings of fact and conclusions of law, not even the immediate parties would know that the wrong committed was an inadequate investigation: they would know only that the employer lost the sexual harassment case.

Cooper, *supra* note 14, at 215 (footnotes omitted).

[128]*Gilmer*, 500 U.S. at 31; *see also* Cooper, *supra* note 14, at 215-18.

[129]*Gilmer*, 500 U.S. at 31; *see also* Cooper, *supra* note 14, at 218 (Arbitrators "are completely inadequate to develop the law. Could an arbitrator have come up with the disparate impact theory of discrimination? With an understanding that environmental sexual harassment is sex discrimination?") (footnotes omitted).

[130]*Gilmer*, 500 U.S. at 32.

[131]*Id.*

[132]*Id. But see* Cooper, *supra* note 14, at 222 ("[S]ettlement is based on a prediction of the outcome of litigation; arbitration [when it is the product of the employer's coercion and the

Because the NYSE rules at issue in *Gilmer* specifically required arbitrators to issue written opinions, it is unclear whether such a requirement is necessary to obtain judicial enforcement of employment arbitration agreements. A cautious employer, however, should include such a requirement in an arbitration provision to ensure enforcement.

D. Judicial Review

Compulsory arbitration of statutory employment claims also has been criticized on the basis of limited judicial review.[133] The FAA allows a reviewing court to vacate an arbitration award in limited circumstances, including "[w]here the award was procured by corruption, fraud or undue means;" "[w]here there was evident partiality or corruption [by] the arbitrators;" where there existed specified misconduct by the arbitrators, or "[w]here the arbitrators exceeded their powers."[134] However, federal courts have tended to add a gloss to these provisions[135] and, in effect, have required that an arbitrator must grant the parties a fundamentally fair hearing.[136] The courts seem to agree that a fundamentally fair hearing requires notice, an opportunity to be heard and to present relevant and

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employer's expectation that she will more likely win in arbitration than litigation] is based on an avoidance of the outcome of litigation.").

[133]*Gilmer*, 500 U.S. at 31-32; *see also* Cooper, *supra* note 14, at 216-17.

[134]Bowles Fin. Group, Inc. v. Stifel, Nicolaus & Co., 22 F.3d 1010, 1012 (10th Cir. 1994) (citing 9 U.S.C. § 10(a)-(e) (1988) (current version at 9 U.S.C. § 10(a)(1)-(4) (Supp. V 1993)).

[135]*Id.* (noting that these FAA provisions are not interpreted literally); Jenkins v. Prudential-Bache Sec., Inc., 847 F.2d 631, 633 (10th Cir. 1988) ("[F]ederal courts have never limited their scope of review to a strict reading of [9 U.S.C. § 10].").

[136]Burchell v. Marsh, 58 U.S. (17 How.) 344, 349 (1854) ("If an award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact."); Forsythe Int'l, S.A. v. Gibbs Oil Co., 915 F.2d 1017, 1020 (5th Cir. 1990) ("In reviewing the district court's vacatur, we posit the . . . question . . . whether the arbitration proceedings were fundamentally unfair."); Hoteles Condado Beach v. Union de Tronquistas Local 901, 763 F.2d 34, 40 (1st Cir. 1985) ("Vacatur is appropriate only when the exclusion of relevant evidence 'so affects the rights of a party that it may be said that he was deprived of a fair hearing.'" (citation omitted)); National Post Office Mailhandlers v. United States Postal Serv., 751 F.2d 834, 841 (6th Cir. 1985) ("[T]he standard for judicial review of arbitration procedures is merely whether a party to arbitration has been denied a fundamentally fair hearing."); Hall v. Eastern Air Lines, Inc., 511 F.2d 663, 663-64 (5th Cir. 1975) ("[R]eview is not absolutely foreclosed where petitioner alleges a denial of fundamental due process."); Bell Aerospace Co. Div. of Textron v. Local 516, Int'l Union, 500 F.2d 921, 923 (2d Cir. 1974) ("[A]n arbitrator need not [observe] all the niceties [of] federal courts. He need only grant . . . a fundamentally fair hearing.").

material evidence and argument, and unbiased decision makers.[137]

This limited scope of judicial review will not support attempts to deny enforcement of employment arbitration agreements. Citing a case from the *Mitsubishi* Trilogy, the Supreme Court in *Gilmer* stated that "'although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute' at issue."[138]

E. The Arbitrator's Ability to Award Relief

Employment arbitration agreements also have been criticized because of the limited authority of arbitrators to award relief. Writing before *Gilmer* was decided, Professor Richard Shell stated that the remedial powers of arbitrators in securities industry employment disputes "are limited to granting or denying relief requested by the particular parties before them and do not include monitoring long-term injunctive relief or making sweeping institutional reforms."[139] Shell thus concluded that securities arbitration procedures "simply would not be suited to implementing the systemic, institutional interests embodied in Title VII."[140]

The *Gilmer* Court, while not directly addressing Professor Shell's concerns about institutional and long-term injunctive relief, nonetheless discussed generally the argument that the arbitrator's ability to award relief was too limited. The Court first noted that NYSE rules granted NYSE arbitrators the authority to award equitable relief and to hear class actions.[141] The Court stated further that even if such authority were

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[137]*Bowles*, 22 F.3d at 1013; *see* Robbins v. Day, 954 F.2d 679, 685 (11th Cir.) ("[T]he Federal Arbitration Act allows arbitration to proceed with only a summary hearing and with restricted inquiry into factual issues."), *cert. denied*, 113 S. Ct. 201 (1992); Employers Ins. v. National Union Fire Ins. Co., 933 F.2d 1481, 1491 (9th Cir. 1991) (concluding that a fair hearing is based on notice, opportunity to be heard and to present evidence, and lack of biased decision making); Sunshine Mining Co. v. United Steelworkers, 823 F.2d 1289, 1295 (9th Cir. 1987) ("[H]earing is fundamentally fair if it meets the 'minimal requirements of fairness'—adequate notice, a hearing on the evidence, and an impartial decision." (quoting Ficek v. Southern Pacific Co., 338 F.2d 655, 657 (9th Cir. 1964), *cert. denied*, 380 U.S. 988 (1965))); *Hoteles Condado Beach*, 763 F.2d at 39 (holding that an arbitrator must give each party an adequate opportunity to present evidence and arguments).

[138]Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 n.4 (1991) (quoting Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987)).

[139]Shell, *supra* note 14, at 568.

[140]*Id.*

[141]*Gilmer*, 500 U.S. at 32.

lacking, that circumstance would not justify a conclusion that arbitral procedures were inadequate to protect employees' statutory rights.[142]

Many federal employment antidiscrimination statutes, as well as most state common law torts, authorize punitive damage awards. Some employers, when implementing employment arbitration systems, have inserted clauses that limit arbitrators' authority to award punitive damages.[143] It remains to be seen whether the courts will compel arbitration of discrimination claims under agreements containing such limitations. It can be argued in such circumstances that the employee has waived her right to seek punitive damages by contractual agreement. As Judge Richard Posner points out:

> [s]hort of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract. For that matter, parties to adjudication have considerable power to vary the normal procedures, and surely can stipulate that punitive damages will not be awarded.[144]

It seems reasonably clear that parties to a discrimination claim that already has arisen may effectively stipulate that punitive damages will not be awarded. It is less clear whether parties may make such a stipulation before a claim has arisen. Because Title VII vests in employees certain rights that are nonwaivable,[145] a prospective waiver of substantive Title VII

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[142]*Id.* ("[E]ven if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred." (quoting Nicholson v. CPC Int'l Inc., 877 F.2d 221, 241 (3d Cir. 1989) (Becker, J., dissenting))). The Court also noted that "arbitration agreements [would] not preclude the EEOC from bringing actions seeking class-wide and equitable relief." *Id. But see* Cooper, *supra* note 14, at 219-20 (arguing that the EEOC offers employees little protection because the Commission files suit in less than one percent of the claims it receives).

[143]Bales & Burch, *supra* note 11, at 633; Jacobs, *supra* note 13, at B5.

[144]Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994) (citations omitted).

[145]Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 n.15 (1974), *rev'g* 410 U.S. 925 (1973), *cert. denied*, 423 U.S. 1058 (1976).

rights is unenforceable.[146] Although *Gilmer* makes it clear that parties to an employment agreement may prospectively waive or alter certain statutory procedures for enforcing substantive Title VII rights (such as the right to seek judicial relief), it is less clear whether *Gilmer* authorizes the parties to prospectively waive their Title VII right to seek statutorily authorized damages.

The *Gilmer* Court stated that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum."[147] In *Kinnebrew v. Gulf Ins. Co.*,[148] the United States District Court for the Northern District of Texas ordered to arbitration plaintiff's claims under the Federal Equal Pay Act[149] and the Texas Commission on Human Rights Act[150] despite the fact that the arbitration agreement did not provide for the award of punitive damages, attorneys' fees, or equitable relief.[151] The court reasoned that an employee's right to such relief was not a "substantive" right and that it therefore was waivable.[152] However, by retaining jurisdiction in the case "to consider any statutory remedy to which plaintiff is entitled after arbitration is completed,"[153] the court left open the possibility that it would allow the employee to recover these types of relief in a subsequent judicial action.

The majority of courts which have addressed the issue have held that a party with a statutory right to seek punitive damages may do so notwithstanding an arbitral agreement to limit damages. This issue has arisen several times in New York, where state law forbids an arbitrator

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[146]Schwartz v. Florida Bd. of Regents, 807 F.2d 901, 906 (11th Cir. 1987); Rogers v. General Elec. Co., 781 F.2d 452, 454-55 (5th Cir. 1986); Williams v. Vukovich, 720 F.2d 909, 926 (6th Cir. 1983); *see* Cox v. Allied Chem. Corp., 538 F.2d 1094, 1097-98 (5th Cir. 1976), *cert. denied sub nom.* Allied Chem. Corp. v. White, 434 U.S. 1051 (1978); Watkins v. Scott Paper Co., 530 F.2d 1159, 1169-72 (5th Cir.), *cert. denied*, 429 U.S. 861 (1976); United States v. Allegheny-Ludlum Indus., 517 F.2d 826, 853-59 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); Baker v. Chicago, Fire & Burglary Detection, Inc., 489 F.2d 953, 955-56 (7th Cir. 1973).

[147]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)).

[148]67 Fair Empl. Prac. Cas. (BNA) 189 (N.D. Tex. 1994).

[149]29 U.S.C. § 206(d).

[150]TEX. LAB. CODE ANN. §§ 21.001-.306 (Vernon 1994).

[151]Kinnebrew v. Gulf Ins. Co., 67 Fair Empl. Prac. Cas. (BNA) 189, 190 (N.D. Tex. 1994).

[152]*Id.* at 190-91.

[153]*Id.* at 191.

from awarding punitive damages.[154] In some cases, courts have severed the punitive damage claim from the rest of the case, required the parties to submit the non-punitive damage claims to arbitration, and stayed the punitive damages for resolution by the court after an arbitration award has been made.[155]

Another approach, adopted by the Ninth Circuit in *Graham Oil Co. v. Arco Products Co.*,[156] is to strike the arbitration clause altogether and allow the entire claim to be litigated. *Graham Oil* involved a suit by a gasoline retailer alleging that its supplier unlawfully raised its prices in violation of the Federal Petroleum Marketing Practices Act (PMPA).[157] The supplier sought to compel arbitration on the basis of an arbitration agreement. The Ninth Circuit agreed with the supplier that, generally, this dispute would be arbitrable, since an agreement to submit statutory claims to arbitration "constitutes nothing more than an agreement to substitute one legitimate dispute resolution forum for another, and involves no surrender of statutory protections or benefits."[158] In this case, however, the arbitration agreement expressly forfeited the retailer's statutory right to recover punitive damages and attorneys' fees.[159] It also altered the statute of limitations.[160] Noting that the purpose of the PMPA was to protect retailers from the "dominant economic power" exercised by suppliers,[161] the court declined to sever the offending provisions of the arbitration clause and instead refused to enforce the arbitration agreement, thus permitting the retailer to seek redress for all its claims in court.[162]

The New York approach is more consistent with current law favoring enforcement of arbitration agreements than the Ninth Circuit approach.[163] The New York approach preserves the employees' statutory right to enumerated damages while enforcing an agreement to arbitrate the merits

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[154]Garrity v. Lyle Stuart, Inc., 353 N.E.2d 793, 794 (N.Y. 1976). *But see* Singer v. Salomon Bros., Inc., 593 N.Y.S.2d 927, 929-30 (N.Y. Sup. Ct. 1992) (permitting arbitrator of dispute regarding a claim of disability discrimination to award punitive damages).

[155]DiCrisci v. Lyndon Guar. Bank, 807 F. Supp. 947, 953-54 (W.D.N.Y. 1992); Chisolm v. Kidder, Peabody Asset Management, Inc., 810 F. Supp. 479, 485 (S.D.N.Y. 1992); Mulder v. Donaldson, Lufkin & Jenrette, 611 N.Y.S.2d 1019, 1021-22 (N.Y. Sup. Ct. 1994).

[156]43 F.3d 1244, 1249 n.3 (9th Cir. 1994).

[157]15 U.S.C. §§ 2801-06 (1988).

[158]*Graham Oil*, 43 F.3d at 1247.

[159]*Id.* at 1247-48.

[160]*Id.* at 1248.

[161]*Id.* at 1247.

[162]*Id.* at 1248-49.

[163]*See supra* part II.

of the underlying dispute. It also discourages employers from insisting on arbitral provisions restricting employees' abilities to seek the relief to which they are statutorily entitled. Two cases—one in arbitration and one in litigation—exist where one existed before; if the employee prevails in arbitration on the issue of liability, the punitive damage claim will be tried in court, probably to a jury. This inefficient process will obviate most if not all of the advantages of proceeding through arbitration.[164] As a result, it will likely take only a few rulings in this direction to convince employers not to attempt to limit arbitral relief.

F. Procedures for Implementing Compulsory Arbitration Agreements

An employer may be able to implement a compulsory arbitration agreement simply by announcing the compulsory arbitration policy as a new term and condition of employment. For example, in *Kinnebrew*[165] and in *Lang v. Burlington Northern Railroad*,[166] the federal district courts for the Northern District of Texas and the District of Minnesota compelled arbitration of wrongful termination claims under arbitration procedures that were unilaterally established by the employers' announcement of the procedures. Similarly, in *Hathaway v. General Mills, Inc.*, the Texas Supreme Court held that an employer may modify the conditions of at-will employment (in this case, sales commission terms) simply by giving an employee adequate notice; if the employee continues working, she is deemed to have accepted the new terms.[167]

Most employers which have instituted compulsory arbitration programs have opted not to gamble on the enforceability of a unilaterally imposed arbitration requirement and have, instead, taken varying steps to obtain individual written arbitration agreements from new or current employees. The primary advantage to using written contracts is that it minimizes the possibility of a court declaring the agreement to be an unenforceable adhesion contract.[168] An adhesion contract is a "standardized contract, which, imposed and drafted by the party of superior bargaining strength,

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[164]*See* Shearson Lehman Hutton, Inc. v. McKay, 763 S.W.2d 934, 939 (Tex. App.—San Antonio 1989, no writ).

[165]Kinnebrew v. Gulf Ins. Co., 67 Fair Empl. Prac. Cas. (BNA) 189 (N.D. Tex. 1994).

[166]835 F. Supp. 1104, 1105-07 (D. Minn. 1993).

[167]711 S.W.2d 227, 228-29 (Tex. 1986); *see also* Jennings v. Minco Tech. Labs., Inc., 765 S.W.2d 497 (Tex. App.—Austin 1989, writ denied) (enforcing employer's unilateral implementation of drug testing policy).

[168]*See* Howard, *supra* note 14, at 266-69.

relegates to the subscribing party only the opportunity to adhere to the contract or reject it."[169] Generally, an adhesion contract is fully enforceable.[170] However, such a contract will not be enforced if it is not within the reasonable expectation of the weaker party or if it contains terms which are unduly oppressive or unconscionable.[171]

An employment arbitration agreement, especially if presented to a large group of employees on a take-it-or-be-fired basis, is almost certainly an adhesion contract. *Gilmer* rejected the suggestion that all employment arbitration agreements are unenforceable on this ground alone.[172] Instead, the Court indicated that claims of unequal bargaining power must be examined on a case-by-case basis, using the same standards as are applicable to any other contract case.[173] Therefore, to ensure enforceability, the terms of an arbitration agreement must be within an employee's reasonable expectations and must not be oppressive or unconscionable.[174]

To ensure that the terms of an arbitration agreement accord with employees' expectations, the agreement must clearly specify the types of employment disputes that are arbitrable and the persons or parties to whom the agreement applies. For example, in *Farrand v. Lutheran Brotherhood*, the Seventh Circuit refused to compel arbitration of an age discrimination claim because it was unclear whether the arbitration agreement covered that type of claim.[175] Similarly, in *Prudential*

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[169]Neal v. State Farm Ins. Cos., 10 Cal. Rptr. 781, 784 (Cal. Dist. Ct. App. 1961); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 211 (1979); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983).

[170]Graham v. Scissor-Tail, Inc., 623 P.2d 165, 172 (Cal. 1981).

[171]*Id.* at 172-73; Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449-50 (D.C. Cir. 1965); RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1979).

[172]Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991). Moreover, in order to support revocation on the basis of fraudulent or coercive inducement, the employee must show that the employer's conduct induced her to agree to the arbitration clause separately from the broader employment agreement. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402 (1967); Hampton v. ITT Corp., 829 F. Supp. 202, 204 (S.D. Tex. 1993).

[173]*Gilmer*, 500 U.S. at 33.

[174]For examples of arbitration agreements that have been held to be unenforceable adhesion contracts, see Broemmer v. Abortion Servs., Ltd., 840 P.2d 1013, 1017 (Ariz. 1992) (arbitration agreement between physician and patient); Patterson v. ITT Consumer Fin. Corp., 18 Cal. Rptr. 2d 563, 567 (Cal. Ct. App. 1993) (arbitration agreement between borrowers and finance company), *cert. denied*, 114 S. Ct. 1217 (1994).

[175]993 F.2d 1253, 1254-55 (7th Cir. 1993). *But see* Kidd v. Equitable Life Assurance Soc'y of the United States, 32 F.3d 516, 519 (11th Cir. 1994).

Insurance Co. v. Lai,[176] the Ninth Circuit refused to compel arbitration of a sexual harassment claim because the arbitration agreement did not explicitly state that it applied to such employment disputes. Arbitration provisions, therefore, should clearly state that they apply to employment disputes and, more specifically, to employment discrimination claims.

To ensure that the terms of an arbitration agreement are neither oppressive nor unconscionable, the agreement must be scrupulously fair to employees. Adhering to the suggestions made in this Article will maximize the probability that an agreement will be enforced.

IV. CONCLUSION

Although compulsory employment arbitration is finding increasing favor in the courts, agreements requiring arbitration of statutory discrimination claims must be scrupulously fair to ensure judicial enforcement. They should permit both parties to participate equally in the selection of arbitrators either by mutual choice or from a pool of disinterested neutrals. They should permit ample discovery, including document production, information requests, depositions, and subpoenas. They should require the arbitrator to issue a written opinion. They should not attempt to limit the arbitrator's ability to award relief by, for example, forbidding an award of punitive damages. The agreement should be in writing, should specify the types of employment disputes that are covered by the agreement, and should specify the persons or parties to whom the agreement applies. In short, the arbitral process that is substituted for litigation should be, in appearance as well as substance, scrupulously fair to the employee.

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[176] 42 F.3d 1299, 1305 (9th Cir. 1994).