Creating and Challenging Compulsory Arbitration Agreements*

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In the 1991 decision of *Gilmer v. Interstate/Johnson Lane Corp.*,[1] the United States Supreme Court enforced for the first time an employee's agreement to submit all claims against his employer, including statutory ones, to arbitration instead of litigating them in court. In the years since *Gilmer*, employers increasingly have begun to require their employees to sign prospective arbitration agreements as a condition of employment.[2] This, coupled with the apparent judicial acceptance of such agreements, has led to a quiet and ongoing revolution in how employment disputes are resolved.

There has been an abundance of commentary in recent years, from both the bar and the legal academy, on whether the *Gilmer* brand of arbitration is an appropriate way to resolve employment disputes, and whether *Gilmer* (and the lower court decisions which have extended *Gilmer*) were correctly decided.[3] This article, however, sets those theoretical issues aside, and instead takes a more practical look at what courts are requiring of compulsory arbitration agreements as a prerequisite to judicial enforcement. The article discusses several different ways in which employment arbitration agreements have been challenged. For each, the article first examines existing case law to delineate the minimum requirements currently required for obtaining enforcement, and then provides recommendations, both to courts regarding what the minimum standards should be, and to employers regarding how their agreement should be drafted.

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1. 500 U.S. 20, 33 (1991).

2. RICHARD A. BALES, COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT 2 (1997) [hereinafter COMPULSORY ARBITRATION]; 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, 1912 (Spring 1994).

3. *See, e.g.*, COMPULSORY ARBITRATION, *supra* note 2; Stuart H. Bompey et al., *The Attack on Arbitration and Mediation of Employment Disputes*, 13 THE LABOR LAW. 21 (Summer 1997); Jay H. Siegel, *Changing Public Policy: Private Arbitration to Resolve Employment Disputes*, 13 THE LABOR LAW. 87 (Summer 1997).

I. Drafting and Implementing Compulsory Arbitration Agreements

A. *Must the Agreement Be in Writing?*

Some employers have implemented compulsory arbitration agreements simply by announcing the compulsory arbitration policy as a new term and condition of employment. For example, in *Kinnebrew v. Gulf Insurance Co.*[4] and *Lang v. Burlington Northern Railroad Co.*,[5] the federal district courts for the Northern District of Texas and the District of Minnesota, respectively, compelled arbitration of wrongful termination claims under arbitration procedures that were unilaterally established by the employers' verbal announcement. Similarly, in *Hathaway v. General Mills, Inc.*,[6] 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; an employee who continues working is deemed to have accepted the new terms.[7]

Notwithstanding the cases upholding oral arbitration agreements, the Federal Arbitration Act (FAA)[8] requires courts to stay judicial proceedings only for "any issue referable to arbitration *under an agreement in writing.*"[9] Courts considering this writing requirement have not interpreted it strictly. For instance, in *Nghiem v. NEC Electronic, Inc.*,[10] the arbitration provision was contained in an employment handbook, which the employee had received, but apparently had not been required to sign. The Ninth Circuit held that this was sufficient to satisfy the writing requirement, because while the FAA "requires a writing, it does not require that the writing be signed by the parties."[11] Additionally, since the employee had initiated the arbitration proceedings, the court concluded that an agreement to arbitrate could be inferred from this conduct.[12]

Similarly, the underlying employment agreement need not be in writing to satisfy the "agreement in writing" provision.[13] In *Durkin v.*

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4. 67 Fair Empl. Prac. Cas. (BNA) 189, 190-91 (N.D. Tex. 1994).
5. 835 F. Supp. 1104, 1106 (D. Minn. 1993).
6. 711 S.W.2d 227 (Tex. 1986).
7. *Hathaway,* 711 S.W.2d at 229. *See also* Jennings v. Minco Tech. Labs., Inc., 765 S.W.2d 497, 592 (Tex. App. 1989) (enforcing employer's unilateral implementation of drug testing policy).
8. 9 U.S.C. §§ 1-16 (1994).
9. *Id.* § 3 (emphasis added).
10. 25 F.3d 1437, 1439-40 (9th Cir.), *cert. denied,* 115 S. Ct. 638 (1994).
11. *Nghiem,* 25 F.3d at 1439 (quoting Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 846 (2d Cir. 1987)). *See also* Durkin v. Cigna Property & Cas. Corp., 942 F. Supp. 481 (D. Kan. 1996).
12. *Nghiem,* 25 F.3d at 1439-40.
13. *See also* Brown v. KFC National Management Co., 921 P.2d 146, 159 (Hawaii 1996) (enforcing a written arbitration agreement where the underlying employment relationship was at-will); White-Weld & Co. v. Mosser, 587 S.W.2d 485, 486-87 (Tex. Civ. App. 1979), *cert. denied,* 446 U.S. 966 (1980) (enforcing written arbitration agreement where the underlying employment agreement was oral).

Cigna Property & Casualty Corp.,[14] the plaintiff was an at-will employee with no written employment contract. The arbitration provision the employer sought to enforce was contained in a written dispute resolution policy that the employer had distributed to its employees, including the plaintiff. The policy provided that it "is part of the employment relationship," that both the employer and the employee "will be bound" by the outcome of arbitration, and that the arbitration decision "will be enforceable in court."[15] The employer apparently did not, however, require employees to sign the policy. Nonetheless, the Federal District Court for the District of Kansas enforced the arbitration provision. The district court held that at-will employment satisfies the "agreement" requirement of the FAA, and that the employer's announcement of the arbitration policy, both verbally in a meeting and in writing by distributing its dispute resolution policy, sufficed to put the plaintiff on notice that the arbitration clause was a condition of her employment.[16]

Most employers who have instituted compulsory arbitration programs have opted not to gamble on the enforceability of a verbally announced arbitration policy and have, instead, taken various steps to obtain individual written arbitration agreements from new or current employees.[17] An employer has a tremendous amount of flexibility in deciding how to draft an arbitration agreement and to which employees the agreement will apply.[18] For example, an employer which anticipates difficulty getting current employees to sign arbitration agreements might decide to impose an arbitration requirement on new hires only. If the employer is implementing a comprehensive dispute resolution program (including, for example, in-house mediation), a "new hire" approach would create significant administrative difficulties because it would force the employer to administer simultaneously both arbitration and litigation policies. Employers implementing such a system, or employers which do not anticipate a negative reaction from current employees, will want to impose arbitration across-the-board. Another alternative is to draft the agreement only for highly-paid "professional" employees.

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14. 942 F. Supp. 481 (D. Kan. 1996).
15. *Durkin*, 942 F. Supp. at 483-84.
16. *Id.* at 487-88.
17. *See, e.g.*, Johnson v. Hubbard Broad. Inc., 940 F. Supp. 1447, 1454 (D. Minn. 1996) ("By signing her name [to an employment agreement containing an arbitration clause, plaintiff] unequivocally and positively expressed an intent to enter into a binding employment agreement. While [plaintiff] represents that she neither read nor understood [the arbitration clause], her affirmations cannot insulate her from the contractual obligations which she has incurred as a result of signing the Agreement.").
18. *See* Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989) ("Arbitration under the [Federal Arbitration] Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted.") (citation omitted).

A sample arbitration agreement is attached as Appendix A to this article. The sample agreement, which is drafted as a stand-alone individual agreement, may be modified to fit any of these three approaches.

1. Drafting the Agreement for New Hires Only

Drafting the arbitration agreement for new hires only is the easiest way to implement compulsory arbitration because it does not require the employer to convince current employees to sign the agreement. The agreement should be in writing and should contain a line for the employee's signature. It should explain which disputes will be settled by arbitration and which, if any, will not. Additionally, the agreement should define arbitration in a manner that makes it clear to the employee that, by agreeing to arbitration, the employee is waiving the right to proceed in court. In setting forth its terms, the agreement should use nonlegal and easy-to-understand language such that it is sufficiently clear to avoid the possibility of an employee claiming later that she did not understand what she was signing. As a practical matter, the new hire should be given an opportunity to consider the agreement before signing it and encouraged to seek the advice of counsel.

In addition to creating a separate, independent or stand-alone agreement, the employer might also consider adding a clause such as the following to its employment application: "By signing this agreement, the applicant agrees to submit all legal disputes concerning this application for employment (including claims of discrimination) to binding arbitration, and waives the right to proceed in court. Moreover, the applicant understands that a term and condition of employment with the Company is that both the Company and the employee agree to submit all legal disputes that arise from their employment relationship to binding arbitration, and the parties hereby waive their right to proceed in court." Such a clause would permit the employer to compel arbitration not only of claims brought by new hires, but also of claims brought by applicants before they are hired. It also may suffice, by itself, to bind the employee to arbitrate all future disputes arising out of the employment relationship.[19]

2. Drafting the Agreement for Current Employees

Although drafting employment agreements for new hires only is the easiest way to implement employment arbitration, an across-the-board

19. Sheller v. Frank's Nursery & Crafts, Inc., 957 F. Supp. 150, 154 (N.D. Ill. 1997) (compelling arbitration pursuant to arbitration clause in plaintiffs' employment application; "By accepting employment . . ., [p]laintiffs assented to be bound by their prior agreement that, if employed, they would submit all claims to arbitration."); *Brown*, 921 P.2d at 159, 163-64 (compelling arbitration of plaintiff's discriminatory discharge claim based on arbitration provision contained in plaintiff's employment application); *White-Weld*, 587 S.W.2d at 486-87 (compelling arbitration of plaintiff's breach of employment contract claim where arbitration provision was contained in his employment application).

implementation of arbitration is easier to administer because, as of the implementation date, all employees are covered by the same policy. There are two ways that employers might draft an across-the-board arbitration agreement. The first is to draft comprehensive, stand-alone agreements containing all terms of the arbitration agreement, or incorporating by reference the rules promulgated by a neutral entity, such as the American Arbitration Association (AAA), for each employee's signature. The disadvantage to this approach is that a comprehensive arbitration agreement might be several pages long, and this could be intimidating to employees. An alternative approach is to put the terms of the agreement in an employee handbook, and then to incorporate those terms by reference in a separate stand-alone agreement signed by the employee.

A. Comprehensive Stand-Alone Agreements

A stand-alone arbitration agreement for current employees should contain the same elements as the agreement described above for new hires. Rather than specifying all the procedures to be used when proceeding to arbitration, the sample agreement simply incorporates the AAA rules by reference. The sample agreement appended to this article is a stand-alone agreement.

Some commentators have argued that the employer must provide the employee with some independent consideration—such as an increase in salary or benefits—to make a stand-alone arbitration agreement valid.[20] This should not be necessary if, as is usually the case, both the employer and the employee agree to arbitration, and thereby agree to forfeit the same procedural rights such as the right to trial by jury, the right to extensive discovery, and a broad right to appeal.[21] Under these

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20. *See, e.g.*, Amy L. Ray, Comment, *When Employers Litigate To Arbitrate: New Standards of Enforcement for Employer-Mandated Arbitration Agreements*, 51 SMU L. Rev. _____, _____ (forthcoming 1998) (manuscript on file with author); Michele M. Buse, Comment, *Contracting Employment Disputes Out of the Jury System: An Analysis of the Implementation of Binding Arbitration in the Non-Union Workplace and Proposals to Reduce the Harsh Effects of a Non-Appealable Award*, 22 Pepp. L. Rev. 1485, 1526-27 (1995) ("Employers may opt to make individual contracts with their employees, asking them to acknowledge the new arbitration policy and agree to be bound by its terms. This, however, must be supported by independent consideration to make the contract valid.").

21. *See e.g.*, Hellenic Lines, Ltd. v. Louis Dreyfus Corp., 372 F.2d 753, 758 (2d Cir. 1967) ("Hellenic's promise to arbitrate was sufficient consideration to support Dreyfus' promise to arbitrate."); *Durkin*, 942 F. Supp. at 488 (holding that plaintiff's continued employment provided sufficient consideration to support her arbitration agreement); Golenia v. Bob Baker Toyota, 915 F. Supp. 201, 204 (S.D. Cal. 1996) (upholding arbitration agreement in a claim alleging violations of the Americans with Disabilities Act); Lacheney v. ProfitKey Int'l, 818 F. Supp. 922, 925 (E.D. Va. 1993) ("The agreement of one party to a contract to arbitrate disputes is sufficient consideration to support the other parties agreement to do the same."); *cf.* Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126, 1130-32 (7th Cir. 1997) (refusing to enforce agreement by which the employee, but not the employer, agreed to arbitrate all future claims); Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138 (Cal. Dist. Ct. App. 1997) (same).

circumstances, the employer's consideration for the employee's waiver of her procedural rights is the employer's waiver of identical rights. Similarly, an arbitration agreement will not fail for lack of mutuality so long as the employer, like the employee, is bound by the arbitration agreement.[22]

B. EMPLOYEE HANDBOOKS

The employer might instead choose to implement the arbitration agreement by adding the policy to its employee handbook. The handbook should contain all the terms of the agreement in nonlegal, easy-to-understand language and, like the agreements for new hires and individual employees, should clearly explain the consequences of signing an arbitration agreement.

The advantage to including an arbitration agreement in an employee handbook is that the agreement submitted for the employee's signature can be much simpler and easier to understand. The problem with this approach is that most employers go to great lengths to make certain that courts do *not* interpret the handbook as a binding contract. Employers do this because employees frequently cite handbooks in breach of contract cases to argue that the employer has abrogated the at-will employment relationship, or has contractually promised to follow the disciplinary procedures outlined in the handbook.[23] A court is unlikely to enforce an arbitration agreement contained in a handbook if the handbook states that it is not contractually binding.[24] For example, in *Heurtebise v. Reliable Business Computers, Inc.*,[25] the Michigan Supreme Court refused to enforce an arbitration agreement in an employment handbook because the handbook stated that its provisions

22. *Durkin*, 942 F. Supp. at 487-88 (mutuality of contract present where both parties were bound to arbitration provision); Albert v. National Cash Register Co., 874 F. Supp. 1324, 1326 (S.D. Fla. 1994) (same); *cf.* Hull v. Norcom, Inc., 750 F.2d 1547, 1549 (11th Cir. 1985) (arbitration agreement void because not mutually binding).

23. *See, e.g.*, Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257, 1264 (N.J. 1985), *modified*, 499 A.2d 515 (N.J. 1985) (enforcing termination clauses, including the procedure required before termination occurs, within the company's policy manual); Weiner v. McGraw-Hill, Inc., 443 N.E.2d 441, 446-47 (N.Y. 1982) (holding that plaintiff had a breach of contract claim where he was discharged without the "just and sufficient cause" or the rehabilitative efforts specified in personnel handbook); Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880, 885 (Mich. 1980) (enforcing provision of employment contract providing that employee shall not be discharged except for cause).

24. *See, e.g., Gibson*, 121 F.3d at 1133 (7th Cir. 1997) (Cudahy, J., concurring) (employer's promise to arbitrate was illusory because of handbook's sweeping disclaimer language, and arbitration agreement contained in that handbook therefore was unenforceable); Owens v. Brookwood Med. Ctr. of Tampa, Inc., 11 I.E.R. Cas. 1310 (M.D. Fla. 1996) (holding that arbitration agreement in employee handbook was not binding, but ordering case to arbitration because the employee had signed an acknowledgment form containing an arbitration agreement); Federal Express Corp. v. Dutschmann, 846 S.W.2d 282, 284 (Tex. 1993) (holding that employee manual did not create an enforceable contract).

25. 550 N.W.2d 243 (1996).

did "not create any employment or personnel contract, express or implied."[26]

To avoid this problem, an employer wishing to implement an arbitration policy through its handbook should require employees to sign individual written acknowledgments that refer to the terms detailed and summarized in it.[27] For example, in *Topf v. Warnaco, Inc.*,[28] the arbitration provision which the defendant sought to enforce was contained in the employee handbook. On his first day of work, the plaintiff signed an "Acknowledgment of Receipt of the Warnaco Employee Handbook," which provided:

> I [ ] understand that this Handbook is not and was not intended to serve as a contract between Warnaco and myself regarding the nature or duration of my employment with Warnaco, accept that this handbook is our entire agreement concerning each party's right to arbitrate employment disputes and to terminate the employment relationship with or without cause at any time, and that no one at Warnaco is authorized to make an exception to this understanding, except an officer of Warnaco who does so in writing.[29]

The Federal District Court for the District of Connecticut enforced the arbitration agreement.[30]

As the *Topf* case makes clear, requiring employees to sign written acknowledgments referring to arbitration provisions in their employee handbook effectively converts the handbook provision into a stand-alone arbitration agreement. Like the agreements for new hires and the stand-alone agreements discussed previously, the language in both the handbook and the written acknowledgments should be nonlegal and easy to understand. The acknowledgment should clearly state that it incorporates by reference the pertinent handbook provisions, and that it constitutes a binding contract.

3. Drafting the Agreement for "Professional" Employees Only

A third alternative is to require employment arbitration agreements only for highly paid "professional" employees. Highly paid em-

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26. *Heurtebise*, 550 N.W.2d at 247.

27. *See, e.g.*, Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 834-35 (8th Cir. 1997) (enforcing arbitration agreement notwithstanding handbook's "no contract" disclaimer because the agreement, though contained within the handbook, was detachable and because its language "would sufficiently impart to an employee that the arbitration clause stands alone, separate and distinct from the rest of the handbook"); Reese v. Commercial Credit Corp., 955 F. Supp. 967 (D.S.C. 1997) (enforcing arbitration clause which was both contained in handbook and mailed separately to employee); *but see* Nelson v. Cyprus Bagdad Copper Corp., 119 F.3d 756, 761 (9th Cir. 1997) (refusing to compel arbitration where handbook acknowledgment form only stated that employee had received, read, and understood handbook's provisions, but did not say that employee agreed to be bound by the provisions).

28. 942 F. Supp. 762 (D. Conn. 1996).

29. *Topf*, 942 F. Supp. at 765.

30. *Id.* at 764.

ployees are, on average, more likely to hire a lawyer, more likely to bring suit, more likely to win in litigation,[31] and if these employees win, more likely to receive larger damage awards than lower-level employees.[32] Employers, therefore, who may not object to lower-level employees' litigating their employment disputes, may insist on arbitrating suits brought by highly paid employees since the latter have a greater potential to bring financial disaster to the employer. Moreover, highly paid employees are less likely than lower-paid employees to convince courts not to enforce their arbitration agreements, since they are presumed to have sufficient business acumen and bargaining power to have entered into the agreements knowingly and voluntarily.[33]

B. *Is the Agreement Clearly Drafted?*

The arbitration agreement must be drafted both broadly enough to encompass all possible employment claims, and specifically enough so that an employee cannot later claim that she did not realize, on signing the agreement, that the type of claim she is bringing must be arbitrated. To make the agreement sufficiently broad, the agreement should contain language such as: "The parties agree that any legal or equitable claims or disputes arising out of or in connection with the employment, the terms and conditions of employment, or the termination of employment, will be settled by binding arbitration."[34] The agreement also should specify that it applies not only to claims brought by the employee against the employer, but also to claims brought by the employee against other workers related to employment with the employer. For example, in *DeGaetano v. Smith Barney, Inc.*,[35] an employee sued both her employer and her supervisor in his individual capacity. The court held that the arbitration agreement signed by the employee was applicable not only to the claims asserted against the employer, but also to the claims asserted against the supervisor because the agreement made arbitrable, "disagreements [that] may arise between an individual employee and [Smith Barney] or between employees in a context that involves his/her employer."[36] The court, therefore, granted a motion to compel arbitration on all of the employee's claims.[37]

The broad language mentioned in the previous paragraph should be followed by a list of the types of employment disputes that are ar-

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31. Margaret A. Jacobs, *Executives Are Often Successful in Wrongful-Termination Suits*, WALL ST. J., April 15, 1996, at B5.

32. Buse, *supra* note 20, at 1516.

33. *Id.*; *see also Gilmer*, 500 U.S. at 33.

34. *See* Gateson v. ASLK-Bank, N.V./GER-Banque S.A., No. 94 Civ. 5849, 1995 WL 387720 (S.D.N.Y. June 29, 1995) (compelling arbitration pursuant to an agreement to arbitrate controversies "arising out of or related to" the employment agreement).

35. 70 Fair Empl. Prac. Cas. (BNA) 401 (S.D.N.Y. 1996).

36. *DeGaetano,* 70 Fair Empl. Prac. Cas. at 407 (alteration in original).

37. *Id.*

bitrable.[38] This will ensure that an employee who later brings suit cannot argue that her claim is not covered by the arbitration agreement. For example, in *Farrand v. Lutheran Brotherhood*,[39] 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. Similarly, in *Prudential Insurance Co. of America v. Lai*,[40] 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.

An arbitration provision should also specify that it applies to claims arising under statutory or common law doctrines that did not exist at the time the arbitration agreement was signed. This is necessary because at least one court has refused to enforce an arbitration agreement where the statute under which the employee asserted his claim had not been enacted when the arbitration agreement was signed.[41] The arbitration provision also should specify that it only applies to "legal or equitable" claims, in order to prevent employees from taking to arbitration every trivial disagreement that they have at the workplace. An example of language that is both sufficiently broad and sufficiently specific is found in the second paragraph of the sample agreement in the Appendix.

C. *Is the Agreement Adhesive or Coercive?*

Several commentators have argued that courts should deny enforcement of compulsory employment arbitration agreements because such agreements are adhesive.[42] That is, the agreements constitute adhesion

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38. *See* Maye v. Smith Barney Inc., 897 F. Supp. 100, 103 (S.D.N.Y. 1995); *see also* Jennifer A. Marler, Note, *Arbitrating Employment Discrimination Claims: The Lower Courts Extend Gilmer v. Interstate/Johnson Lane Corp. to Include Individual Employment Contracts*, 74 WASH. U. L.Q. 443, 472 (Spring 1996); Note, *Agreements to Arbitrate Claims Under the Age Discrimination in Employment Act*, 104 HARV. L. REV. 568, 586 (Dec. 1990).

39. 993 F.2d 1253, 1254-55 (7th Cir. 1993); *cf.* Kidd v. Equitable Life Assurance Soc'y, 32 F.3d 516, 519 (11th Cir. 1994); Rudolph v. Alamo Rent A Car, Inc., 952 F. Supp. 311 (E.D. Va. 1997) (refusing to compel arbitration of statutory dispute where employment contract provided only for arbitration of contractual disputes); Bright v. Norshipco & Norfolk Shipbuilding & Drydock Corp., 951 F. Supp. 95, n.1 (E.D. Va. 1997) (discussing same).

40. 42 F.3d 1299, 1305 (9th Cir. 1994). This case has been widely cited—and criticized—for holding that an employer may only compel an employee to arbitrate a claim if the employee "knowingly and voluntarily" agreed to waive her right to a judicial forum. For a discussions of this case, see Nelson v. Cyprus Bagdad Copper Corp., 119 F.3d 756, 759-62 (9th Cir. 1997); Renteria v. Prudential Ins. Co. of Am., 113 F.3d 1104, 1105-08 (9th Cir. 1997); Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126, 1129-30 (7th Cir. 1997); Catherine Chatman, Note, *Mandatory Arbitration of Title VII Claims: A New Approach Prudential Life Insurance Co. of America v. Lai*, 1996 J. DISP. RESOL. 255 (1996).

41. *See* Hoffman v. Aaron Kamhi, Inc., 927 F. Supp. 640, 645 (S.D.N.Y. 1996).

42. For examples of arbitration agreements that have been held to be unenforceable adhesion contracts, see Broemmer v. Abortion Svcs. of Phoenix, Ltd., 840 P.2d 1013, 1015-17 (Ariz. 1992) (arbitration agreement between physician and patient) and Patterson v. ITT Consumer Fin. Corp., 18 Cal. Rptr. 2d 563, 565-67 (Cal. Ct. App. 1993), *cert. denied*, 510 U.S. 1176 (1994).

contracts.[43] An adhesion contract is a "standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it."[44] Generally, an adhesion contract is fully enforceable.[45] However, under state contract law principles, 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.[46]

An employment arbitration agreement, especially if presented to a large group of lower-level employees on a take-it-or-be-fired basis, is almost certainly an adhesion contract. State adhesion law principles, however, do not control cases brought under federal law. As a result, the argument that an arbitration agreement was allegedly the product of adhesion is not a defense to the enforcement of the arbitration clause under the FAA.[47]

Even if state contract law principles will not bar the enforcement of an adhesive employment arbitration agreement, federal law principles may operate to that effect. Although *Gilmer* rejected the suggestion that all employment arbitration agreements are unenforceable merely because they are imposed on a take-it-or-leave-it basis by an employer with greater bargaining power than its employees,[48] the Court also

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43. *See, e.g.*, Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126, 1132 (7th Cir. 1997) (Cudahy, J., concurring); William M. Howard, *Arbitrating Employment Discrimination Claims: Do You Really Have To? Do You Really Want To?*, 43 DRAKE L. REV. 255, 266-69 (1994); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1036 (1996) ("Many pre-hire arbitral agreements are blatant contracts of adhesion."); Robert J. Lewton, Comment, *Are Mandatory, Binding Arbitration Requirements a Viable Solution for Employers Seeking to Avoid Litigating Statutory Employment Discrimination Claims?*, 59 ALB. L. REV. 991, 1019-21 (1996).

44. Neal v. State Farm Ins. Co., 10 Cal. Rptr. 781, 784 (Cal. Dist. Ct. App. 1961); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 211 (1979) (defining standardized agreements); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1173 (Apr. 1983) (contracts of adhesion are "standard form contracts presented on a take-it-or-leave-it basis").

45. *See* Graham v. Scissor-Tail, Inc., 623 P.2d 165, 172 (Cal. 1981).

46. *See id.* at 172-73; *see also* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449-50 (D.C. Cir. 1965) (holding that contract is unenforceable where unconscionability is present at time contract is made); Stirlen v. Supercuts, Inc., 60 Cal.Rptr.2d 138 (Cal. Dist. Ct. App. 1997) (discussing meaning of unconscionability); RESTATEMENT (SECOND) OF CONTRACTS § 211(3) ("[w]here the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement"). *Cf. Brown*, 921 P.2d at 167 (noting that a contract of adhesion is enforceable only if it is both the result of coercive bargaining between parties of unequal bargaining strength and it unfairly advantages the stronger party); Buraczynski v. Eyring, 919 S.W.2d 314, 318-21 (Tenn. 1996) (same).

47. *See* Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932, 934 (9th Cir. 1991); Cohen v. Wedbush, Noble, Cooke, Inc., 841 F.2d 282, 286 (9th Cir. 1988).

48. *Gilmer*, 500 U.S. at 32-33. *See also* Webb v. R. Rowland & Co., 800 F.2d 803, 807 (8th Cir. 1986) ("The use of a standard form [arbitration] contract between two parties of admittedly unequal bargaining power does not invalidate an otherwise valid contractual provision."); *Hoffman*, 927 F. Supp. at 643-44 (S.D.N.Y. 1996) (holding that an arbitra-

stated that "courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.' "[49]

The showing required to support revocation of an arbitration agreement on the basis of fraud or coercive inducement is extremely onerous. It is not enough for an employee to claim that she has been coerced or defrauded into signing the entire employment agreement; this issue "is for the arbitrators and not for the courts."[50] Instead, the employee must prove that her agreement to the arbitration clause itself was the product of fraud or coercion.[51] This "severability doctrine" has been criticized for artificially isolating the arbitration agreement from the underlying agreement of which it is a part.[52] This doctrine is unlikely to affect stand-alone arbitration agreements because the arbitration and underlying agreements are one and the same. However, when an arbitration provision is inserted into a larger employment contract, to justify nonenforcement of the contract, the employee will have to make the almost impossible showing that the arbitration clause, apart from the rest of the agreement, was the product of fraud or coercion.[53]

In some cases, employees have argued that their stand-alone arbitration agreements should not be enforced because of the conditions under which they signed the agreements. In *Maye v. Smith Barney Inc.*,[54] the plaintiffs claimed that their arbitration agreements should not be enforced because they each were told to sign their names approximately seventy-five times on a variety of documents (including an arbitration agreement) without anyone explaining the contents of the documents and without an adequate opportunity to read most of them.[55] The plaintiffs also complained that when they were told to sign these documents the atmosphere was "intimidating, hurried, and tense."[56] The United States District Court for the Southern District of New York nonetheless granted the employer's motion to compel arbitration, citing the rule that one "who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of another contracting party,

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tion clause is not unconscionable simply because it is drafted by an employer); Katz v. Shearson Hayden Stone, Inc., 438 F. Supp. 637, 641 (S.D.N.Y. 1977); Rust v. Drexel Firestone, Inc., 352 F. Supp. 715, 718 (S.D.N.Y. 1972).

49. *Gilmer*, 500 U.S. at 33, *citing* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985).

50. Prima Paint Corp. v. Flood & Conklin Energy Mfg. Co., 388 U.S. 395, 400 (1967).

51. *Id.* at 399-400; *see also* Hampton v. ITT Corp., 829 F. Supp. 202, 204 (S.D. Tex. 1993) (finding that plaintiffs were not unfairly induced to sign the arbitration clauses separately from the employment agreements).

52. *See* Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753, 766 (1990).

53. *Gilmer*, 500 U.S. at 32-33.

54. 897 F. Supp. 100 (S.D.N.Y. 1995).

55. *Maye*, 897 F. Supp. at 106.

56. *Id.* at 107.

is conclusively presumed to know its contents and to assent to them."[57] However, in *Berger v. Cantor Fitzgerald Securities*,[58] a different judge from the Southern District of New York refused to compel arbitration where the plaintiff advanced a similar argument. In *Berger*, the arbitration clause was contained in the plaintiff's U-4 form (the same form at issue in the Supreme Court's *Gilmer* case), which provided that disputes arising out of the plaintiff's employment must be submitted to mandatory arbitration according to NASD rules. Berger, the discharged employee, claimed (1) that he had been misled by the employer into believing that the U-4 form did not contain an arbitration agreement, (2) that he was not given sufficient time to read the agreement before signing it, and (3) that he was never given a copy of the NASD manual referred to in the U-4 form. The Court denied the employer's motion to compel, and instead ordered the parties to engage in discovery concerning the circumstances surrounding Berger's signing of the U-4 form.[59] The Court distinguished *Maye* by noting that, in *Maye*, the one-page arbitration agreement contained a detailed explanation of the arbitration procedures and expressly defined the employment disputes covered by the agreement, whereas in *Berger*, the U-4 form merely made reference to the NASD rules with which Berger was not provided.[60]

The safest route for the employer simply is to ensure that the terms of its arbitration agreements are clearly spelled out and are not oppressive or unconscionable. These conditions will be met if the employer avoids the temptation to overreach by, for example, limiting employees' ability to obtain relief. For instance, in *Golinea v. Bob Baker Toyota*,[61] an employee attempted to persuade the court to deny enforcement of an arbitration agreement on the grounds that the agreement was adhesive. The court noted that the arbitration clause merely substituted the arbitral forum for the litigation forum, and that all provisions in the agreement applied equally to both parties.[62] The court held that, under these circumstances, the agreement was enforceable under both state and federal law.[63] By contrast, the court in *Pony Express Courier Corp. v. Morris*,[64] refused to compel arbitration pursuant to an agreement that, among other things, limited the damages the employee was entitled to seek and did not permit discovery. Adhering to the suggestions made

57. *Id.* at 108 (quoting Metzger v. Edna Ins. Co., 125 N.E. 14 (1920)). *See also* Great Western Mortgage Corp. v. Peacock, 110 F.3d 222, 227-30 (3d Cir. 1997); Johnson v. Hubbard Broad., Inc., 940 F. Supp. 1447, 1444-45 (D. Minn. 1996).

58. 942 F. Supp. 963 (S.D.N.Y. 1996).

59. *Berger*, 942 F. Supp. at 967.

60. *Id.*

61. 915 F. Supp. 201, 204 (S.D. Cal. 1996).

62. *Golinea*, 915 F. Supp. at 204.

63. *Id.*; *see also Brown*, 921 P.2d at 167 (noting that the terms of an arbitration agreement could not be unfair if they applied equally to both parties); Leong v. Kaiser Found. Hosp., 788 P.2d 164, 169 (Haw. 1990) (same).

64. 921 S.W.2d 817, 819 (Tex. App. 1996).

in this article will maximize the probability that an agreement will be enforced.

D. *Does the Agreement Convert At-Will Employment to Just-Cause Employment?*

Most nonunion American workers are employed at-will, meaning that they can quit or be fired at any time, for any reason, unless that reason is otherwise made illegal by law (for example, the laws forbidding certain types of discrimination). By contrast, most unionized American workers are employed pursuant to collective bargaining agreements, agreements which almost always provide that the employer can only fire an employee if it can show "good cause" to do so. Employers invariably prefer that the employment relationship be at-will rather than just cause, because at-will employment gives employers the maximum amount of flexibility in discharge or layoff decisions. An at-will employee can only challenge the employer's discharge decision if she can find a specific legal ground (such as discrimination) for doing so, and the burden is on her to prove that the employer's decision was illegal.[65] An employee employed under a just-cause provision can challenge the employer's discharge decision under any circumstances, and the burden is on the employer to prove that the discharge was justified.[66]

An important issue for at-will employers, then, is whether a compulsory arbitration agreement between an employer and an otherwise at-will employee can legally or practically convert at-will employment to just cause employment. Some commentators have argued that it can.[67]

One way that arbitration might convert at-will employment into just-cause employment is if arbitrators imply from the arbitration agreement itself the parties' intent to convert the relationship to just cause. Many labor arbitrators will imply a just cause limitation in any collective bargaining agreement that is silent regarding discharge requirements, on the theory that to do otherwise would "reduce to a nullity the fundamental provision of a labor-management agreement—the security of a worker in his job."[68] Despite the obvious dissimilarity between simple arbitration agreements and collective bargaining agreements, it is nonetheless possible that arbitrators might imply a just cause limitation from a simple arbitration agreement. Similarly, an arbitrator might perceive that it is her job to decide the case in accordance with what she considers fair and just, rather than strictly

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65. *See, e.g.*, Saint Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2749 (1993).

66. FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 661-63 (4th ed. 1985).

67. 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 (Jan. 1995).

68. Elkouri & Elkouri, *supra* note 66, at 652.

following the law.[69] These risks are enhanced if the arbitrator is an experienced union arbitrator familiar with just-cause employment, but not with at-will employment.

A second way that an arbitration agreement might limit at-will employment is by introducing a contract into an otherwise contract-free employment relationship. The argument is that, by implementing an arbitration agreement, the employer raises the possibility that the agreement will give courts the opportunity to imply an obligation between the parties to deal with one another fairly and in good faith within the context of the agreement to arbitrate,[70] as many courts currently imply such an obligation in all contractual relationships within the context of an agreement to arbitrate.

The effect of the implied doctrine of good faith and fair dealing on at-will employment relationships covered by an arbitration agreement likely will be minimal, however, for two reasons. First, relatively few states recognize the doctrine.[71] Second, and more importantly, the implied duty to act in good faith would apply only to the scope of the contract—the arbitration agreement—and not to the employment relationship generally.[72] Thus, even in states that recognize the doctrine, though the employer would be under a duty to arbitrate in good faith, the employer would not be under such a duty when demoting or discharging an employee. For this reason, the doctrine of good faith and fair dealing is unlikely to extend just cause protection to otherwise at-will employees merely through the introduction of an arbitration agreement.

Another way that arbitration might convert at-will employment into just-cause employment is if the employer attempts to oversell the arbitration agreement. Suppose, for instance, that an employer adopts a comprehensive dispute resolution system (including, for example, an internal dispute resolution process). If the employer (or the employer's supervisors) tell employees that the agreement guarantees them "fairness" or "workplace justice" or "due process," these statements might be interpreted by courts or arbitrators as creating a contractual obligation on the employer only to discharge employees "fairly" or "justifi-

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69. Aristotle, for example, wrote:

> [e]quity is justice in that it goes beyond the written law. And it is equitable to prefer arbitration to the law court, for the arbitrator keeps equity in view, whereas the judge looks only to the law, and the reason why arbitrators were appointed was that equity might prevail.

THE ARBITRATOR'S MANUAL i (1989); 18 Fordham Urb. L.J. 573, 576 n.19 (Summer 1991).

70. *See, e.g.*, Perling v. Citizens and Southern Nat'l Bank, 300 S.E.2d 649, 652 (Ga. 1983).

71. 2 MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 9.6 (1994) (noting that only about one-fifth of the states have recognized the doctrine).

72. Hayford & Evers, *supra* note 67, at 483.

ably" or "after due process," *i.e.*, only to discharge employees for cause.[73] Moreover, a disclaimer in the arbitration agreement purporting to preserve at-will employment may not override inconsistent representations and conduct.[74] Therefore, an employee that wishes to maintain an at-will employment relationship must not oversell an arbitration agreement.

Finally, arbitration might have the practical effect of turning at-will employment into just-cause employment merely because it is much easier to pursue a claim in arbitration than in litigation. The antidiscrimination laws permit anyone, regardless of their race or gender,[75] to challenge any adverse employment action taken against them by their employer. So long as the employee casts her claim in the mold of alleged discrimination, the employer must articulate, if not prove, a legitimate, nondiscriminatory reason for its actions.[76] This, many have argued, has converted the United States from a system of at-will employment to a system of for-cause employment, at least with regard to the classes of persons (such as minorities and women) who can easily make a colorable allegation of discrimination.[77]

In the current litigative system, many who feel that they have been treated unfairly by their employer are constrained from challenging their employer by the high costs of litigation and the difficulty of finding a lawyer to represent them.[78] Thus, because arbitration is simpler and less expensive than litigation, one would expect a larger number of employees to challenge employer conduct if they could do so through arbitration rather than litigation.[79] The possibility of increased claims under an arbitration system is of significant concern to employers, and is a major reason why many employers have hesitated to adopt compulsory arbitration.

However, a simple arbitration agreement should not be interpreted to imply just-cause employment. An arbitration agreement, by itself, does not change the parties' underlying substantive employment rights, but merely changes the forum in which those rights are resolved.[80] Thus, the principles supporting the implication of a just-cause standard from a collective bargaining agreement do not apply to an arbitration agree-

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73. *Id.* at 486-87.

74. *See* Swanson v. Liquid Air Corp., 826 P.2d 664, 668 (Wash. 1992).

75. *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

76. *Hicks*, 113 S. Ct. at 2749.

77. *See, e.g.*, Hayford & Evers, *supra*, note 67, at 506.

78. COMPULSORY ARBITRATION, *supra* note 2, at 154-57.

79. Hayford & Evers, *supra* note 67, at 500. Hayford & Evers take this argument even further, arguing that the resulting pattern of frequent arbitrations "will create in the minds of protected-group members the same type of reasonable expectation of fair treatment in discharge matters that is generally deemed to constitute an enforceable implied-in-fact term of employment," and that, moreover, arbitrators will be compelled by nondiscrimination principles to extend this protection to persons who are outside of protected groups. *Id.* at 506, 520.

80. *Gilmer*, 500 U.S. at 35.

ment because the "fundamental provision" of an arbitration agreement is merely to agree to arbitration, not, as in collective bargaining, to trade job security for industrial peace.[81] However, since this distinction might be lost on a labor arbitrator, an employer wishing to preserve the at-will relationship should ensure that its arbitration agreement does not otherwise abrogate the at-will relationship, and should specify that an employee is only entitled to arbitrate claims involving allegations that the employer acted illegally (as opposed to arbitrarily or without cause).

II. Procedures for Selecting Arbitrators

One of the most pervasive criticisms of compulsory arbitration systems concerns the way arbitrators are selected. This criticism has centered on the securities industry's arbitration rules. Until the securities industry discontinued the arbitration of its employment disputes in September 1997,[82] its rules resulted in a pool of arbitrators that (1) had strong ties to the employers against whom discrimination was alleged, (2) had little or no substantive knowledge of employment law, and (3) was demographically unrepresentative of the general population.[83]

The Supreme Court's *Gilmer* decision, because it was based on a case arising out of the securities industry, often has been treated by courts as having approved that industry's procedures for selecting arbitrators. In *Gilmer*, the Court rejected the plaintiff's argument that arbitration of his age discrimination claim should not be compelled because of the possibility that his case ultimately would be decided by biased arbitrators. The Court noted that the securities industry arbitration rules under which Gilmer's case was to be 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."[84] The Court held that these procedural safeguards were sufficient to protect Gilmer from the possibility of biased arbitrators.[85] 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.[86]

A similar case is *Saari v. Smith Barney, Harris Upham & Co.*[87] In *Saari*, an employee in the securities industry sought to avoid enforce-

81. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 n.6 (1974).
82. *See* 153 DLR AA-1, 1997.
83. *See* COMPULSORY ARBITRATION, *supra* note 2, at 89-101.
84. *Gilmer*, 500 U.S. at 30.
85. *Id.* at 30-31.
86. *Id.* at 30 (alteration in original) (quoting 9 U.S.C. § 10(b)).
87. 968 F.2d 877, 882 (9th Cir.), *cert. denied*, 506 U.S. 986 (1992).

ment of his employment arbitration agreement on the ground that, because the panel of arbitrators would be drawn from the securities industry, the arbitrators necessarily would be biased. The Ninth Circuit disagreed, stating that " '[m]istrust of the arbitral process' " was clearly rejected as a reason for avoiding arbitration by the Court in *Gilmer.*"[88]

Gilmer and *Saari* could be interpreted as prohibiting any prearbitration attempts to avoid enforcement of arbitration agreements on the basis of potential bias. By this argument, an employee could not claim bias until after an arbitral award had been rendered. Only then could she appeal the award, and even then, the appeal would be brought under the extremely narrow judicial review standards discussed in Part VI of this article. However, in addition to rejecting Gilmer's prearbitration attempt to avoid enforcement on the basis of bias, the *Gilmer* Court also stated that "claimed procedural inadequacies [of arbitration] . . . [are] best left for resolution in specific cases."[89] This suggests that employees *can* mount a pre-award challenge to the process of selecting arbitrators, but that the plaintiffs in the above-cited cases simply failed to develop an adequate factual record to support their challenge. Neither the plaintiff in *Gilmer* nor the plaintiff in *Saari*, for example, introduced evidence of the causes of bias. Instead, these plaintiffs simply issued, as the *Gilmer* Court characterized them, "generalized attacks" raising the mere *possibility* of bias. A showing that bias is inherently part of the securities industry's process for selecting arbitrators might (and should) persuade a court not to enforce an arbitration agreement.

Some commentators have argued that arbitral bias is an inherent part of *all* compulsory arbitration agreements because of the employer's unique status as a repeat player in arbitration.[90] In traditional labor arbitration between an employer and a union, both parties participate in arbitration with equal frequency. In employment arbitration, however, the employer alone is a repeat player, because the employee is unlikely to participate in arbitration more than once or twice in his or her entire lifetime. This gives employers two distinct advantages.

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88. *Id.* at 882 (quoting *Gilmer*, 500 U.S. at 34 n.5).

89. *Gilmer*, 500 U.S. at 33.

90. 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, 60-61 (1997); Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381, 426 (Spring 1996); Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 476-79 (Spring 1996); Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of* Gilmer, 14 HOFSTRA LAB. L.J. 1, 43-44 (Fall 1996); Dennis O. Lynch, *Conceptualizing Forum Selection as a "Public Good": A Response to Professor Stone*, 73 DENV. U. L. REV. 1071, 1073 (1996). On the importance of bilateral repeat player status in the context of labor arbitration, see Bernard D. Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, PROC. OF THE 20TH ANNUAL MEETING OF THE NAT'L ACADEMY OF ARB. 1, 3-4 (1997); Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 929-30 (1979).

First, the employer is likely to have both more and better information about proposed arbitrators, allowing the employer to choose an arbitrator who is more likely to render a decision favorable to the employer. Employers will track the records and reputations of arbitrators through networking and internal record keeping; nonunionized employees simply have neither the institutional capacity nor the resources to do the same. The problem might even become self-perpetuating since arbitrators, knowing that employers, but not employees, are likely to be aware of their award record, may consciously or subconsciously favor the employer.

Second, knowledge that the employer is far more likely than the employee to have an opportunity to hire an arbitrator for a successive case may, consciously or subconsciously, induce the arbitrator to favor the employer in a current case. This problem will be particularly acute in areas where a single employer employs a disproportionately large percentage of workers, where there is a limited pool of potential arbitrators, or where only a small number of employers have instituted compulsory arbitration agreements.

The twin problems of information asymmetry and institutional temptation may be ameliorated somewhat by the establishment of a "plaintiff bar" to share information about arbitrators in much the same way as it is made available to employers.[91] It is unlikely, however, that any such organization of employees or employees' advocates could ever match the organizational efficacy of employers. An alternative approach to combating these problems, discussed in Part V of this article, is to require that all arbitral decisions be published and easily accessible to everyone. This would give employers and employees' representatives access to the arbitral records over which employers currently enjoy a virtual monopoly, and provide arbitrators a strong incentive to be impartial.

The "institutional bias" approach to challenging employment arbitration agreements has not yet been tested in the courts. The language and tenor of *Gilmer* indicate that the Court is unlikely to be receptive to any argument that arbitrators are inherently biased. Absent a judicially- or congressionally-imposed requirement that arbitrators issue written opinions, and absent some mechanism for making these opinions publicly available, problems of inherent arbitral bias are likely to remain a concern for the foreseeable future.

A distinctive approach to challenging arbitral bias was taken by the plaintiff in *Olson v. American Arbitration Association, Inc.*[92] Olson filed suit alleging intentional infliction of emotional distress in connec-

91. Martin H. Malin, *Arbitrary Statutory Employment Claims in the Aftermath of Gilmer*, 40 ST. LOUIS U. L.J. 77, 97-98 (1996); Estreicher, *supra* note 52, at 765; Grodin, *supra* note 90, at 44; Lynch, *supra* note 90, at 1073.

92. 876 F. Supp. 850 (N.D. Tex.), *aff'd*, 71 F.3d 877 (5th Cir. 1995).

tion with her employment. Her employer filed a motion to compel arbitration based on an arbitration clause in Olson's employment agreement. The trial court granted the motion. Before the arbitration hearing was held, Olson filed a second suit. In this suit, she claimed that the American Arbitration Association (AAA), a private, nonprofit organization that provides arbitration services, had misrepresented to the public that it provided impartial arbitration services through neutral arbitrators, and that this violated the Texas Deceptive Trade Practices Act. Specifically, she argued that AAA's arbitration panels are biased in favor of employers because (1) the panels are unfairly 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 panelists are lawyers who do not represent a cross-section of society, and (5) AAA receives substantial contributions from employers.[93]

The employer filed a 12(b)(6) motion for failure to state a claim. The court granted the motion. Noting that Olson's contention that her panel of arbitrators would be biased was "speculat[ion] based on stereotypical characteristics," the court held that even if her allegations were true, they were insufficient by themselves to show bias.[94]

The *Olson* case is unique because Olson sued AAA directly for damages, rather than arguing in the suit against her employer that her arbitration agreement should not have been enforced due to arbitral bias. Because the dispute with her employer had not yet been arbitrated, AAA had not yet inflicted any damages on her for which she could obtain relief; by contrast, if she had raised the argument in the suit against her employer, the court would have had the option of refusing to enforce the arbitration agreement. Moreover, Olson's claim of bias was substantially less compelling than claims of bias that could be made against the securities industry, since Olson did not allege that her particular employer had any inappropriate ties to AAA or to the pool of potential arbitrators.

Notwithstanding *Gilmer, Saari,* and *Olson,* employers should be extremely careful to avoid even the appearance of bias in the selection of arbitrators. 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 used successfully for many years in the collective bargaining agreement context.[95] In the nonunion context, the AAA and the Center

93. *Olson,* 876 F. Supp. at 852.
94. *Id.*
95. *See* ELKOURI & ELKOURI, *supra* note 66, at 135.

for Public Resources (CPR) are available to nominate potential arbitrators. In *Williams v. Katten, Muchin & Zavis*,[96] the arbitration agreement at issue provided that if the parties were unable to agree upon an arbitrator within sixty days after a dispute arose, one would be chosen according to AAA rules. The court upheld this procedure against an employee's claim of bias.[97]

III. Representations by Attorneys

Most reported cases about compulsory employment arbitration involve employees, represented by attorneys, who attempt to avoid the effect of their arbitration agreement and instead litigate their case. It is not altogether surprising that employees who can find representation are likely to prefer litigation over arbitration; employees unable to find representation invariably will prefer arbitration to litigation, and hence will not challenge their arbitration agreement in court.[98] Nonetheless, because virtually every employee who has been ordered to arbitration has been represented by an attorney, and since every arbitration agreement that has been challenged in court to date has permitted the employee to be represented by an attorney, an employer would be ill advised, in an arbitration agreement, to forbid the employee legal representation.

Frequently, employers will insert into their arbitration agreements a clause similar to the following: "The employee has the right to be represented by an attorney at all times. However, if the employee elects not to bring a lawyer to the arbitration hearing, the Company also will

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96. 837 F. Supp. 1430, 1433 (N.D. Ill. 1993); *see also Pony Express*, 921 S.W.2d at 821-22 (holding that an arbitration clause allowing AAA to select the arbitrator was not unconscionable because it favored neither party).

97. *Williams*, 837 F. Supp. at 1443. The compulsory arbitration clause at issue in *Williams* specified that an arbitrator was to be chosen according to the AAA Labor Arbitration Rules. *Id.* at 1439. 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.17. 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 noncollective bargaining agreement employment context. AMERICAN ARBITRATION ASSOCIATION, NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES 15-16 (1996) (hereinafter AAA NATIONAL RULES). Rule 11(c) of the AAA National Rules, which covers the selection of arbitrators, is similar to the Labor Arbitration rule at issue in *Williams*.

98. COMPULSORY ARBITRATION, *supra* note 2, at 164-66.

agree not to bring a lawyer to the hearing."[99] A mutual agreement not to use lawyers has the obvious advantage of saving both parties the high price of attorneys' fees. Moreover, recent studies suggest that this decision is unlikely to affect the outcome of the dispute.[100] Orley Ashenfelter and David Bloom, for example, have collected empirical evidence concerning the use and non-use of attorneys in final-offer arbitration proceedings for New Jersey public safety employees (primarily police officers) in the arbitration of discharge grievances, in the arbitration of civil disputes in Pittsburgh, and in the arbitration of child custody disputes in California. After reviewing the data, the authors noted that the outcome of disputes is roughly the same if either both parties or neither party is represented by an attorney. Where only one party is represented by an attorney, however, that party's likelihood of prevailing increases substantially. Ashenfelter and Bloom therefore concluded that, where (as in arbitration) the method of dispute resolution allows the parties a realistic option of representing themselves, the decision to retain lawyers presents a prisoner's dilemma: although it would be in both parties' best interest to represent themselves, both nonetheless will rationally hire lawyers to avoid the "sucker's payoff"[101] a party receives when her opponent hires a lawyer but she does not.[102]

A clause addressing attorney representation, such as the one presented in the above paragraph, avoids this dilemma by reducing the risk an employee would incur by deciding not to hire a lawyer. As the above clause states, if the plaintiff decides not to have an attorney present at the arbitration, the employer will forego attorney representation as well. In one sense, however, it is misleading. If an employee agrees not to bring a lawyer to the arbitration hearing, it is unlikely that she will hire a lawyer to help her develop her case. The employer, however, being far more likely to deal with employment disputes on a recurrent basis, probably has on staff or easily available a lawyer who is familiar with the arbitration process and who can and will help prepare the employer's case and witnesses for the arbitration, even if that lawyer does not attend the hearing itself. Although it is unclear empirically how much of an advantage this might give the employer over the employee, it probably can be assumed that the employer would not bring in lawyers unless it perceived that there was some advantage to doing so.

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99. For a detailed discussion of an arbitration agreement containing such a provision, see COMPULSORY ARBITRATION, *supra* note 2, at 102-14.

100. Orley Ashenfelter & David Bloom, *Lawyers As Agent of the Devil in a Prisoner's Dilemma Game* 11-19, National Bureau of Economic Research Working Paper No. 4447 (Sept. 1993); Richard N. Block & Jack Stieber, *The Impact of Attorneys and Arbitrators on Arbitration Awards*, 40 INDUS. & LAB. REL. REV. 543 (1987).

101. *See* Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 566 n.42 (1994).

102. Ashenfelter & Bloom, *supra* note 100, at 21.

IV. 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 would be difficult without discovery because a plaintiff bringing such a case must prove that she was treated differently than other similarly-situated nonclass members.[103] Therefore, she must discover evidence of how those nonclass members were treated.[104] Proving the disparate impact[105] would be impossible[106] without the opportunity to obtain from an employer statistical information about how the employment practice in question affects different demographic segments of the employee population.[107]

The NYSE rules approved by the Supreme Court in *Gilmer* permitted document production, information requests, depositions, and subpoenas.[108] 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.' "[109] In *Williams*, the arbitration agreement incorporated by reference AAA discovery rules.[110] The employee there argued that the AAA rules inadequately protected her statutory rights because the rules contained no provision specifically permitting or denying discovery. The court noted, however, that the AAA rules authorize an arbitrator to subpoena witnesses and docu-

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103. 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, 218 (1992). See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (specifying the elements the plaintiff must prove to establish *prima facie* case of racial discrimination); *see also* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993) (discussing plaintiff's burden of proof).

104. Cooper, *supra* note 103, at 218.

105. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971) (holding that employers are prohibited from requiring a high school education or passing a standardized general intelligence test as a condition of employment).

106. Cooper, *supra* note 103, at 218.

107. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650-51 (1989) (it is a comparison "between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs" that generally "forms the proper basis for the initial inquiring in a disparate-impact case").

108. *Gilmer*, 500 U.S. at 31.

109. *Id.* (quoting *Mitsubishi*, 473 U.S. at 628); *see also Pony Express*, 921 S.W.2d at 822 (holding that an arbitration clause prohibiting discovery was not unconscionable on its face, but remanding for a factual determination of whether the arbitration agreement as a whole was unconscionable).

110. The arbitration agreement in *Williams* incorporated the AAA rules for labor arbitration. *See Williams*, 837 F. Supp. at 1439. The AAA rules for employment dispute resolution similarly do not contain any provision specifically permitting or denying discovery. They, like the labor arbitration rules, do 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 18 (January 1, 1993).

ments either independently or upon the request of a party.[111] The court held that this was sufficient to protect the employee's right to obtain discovery.[112]

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 prerequisite 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.

Discovery is, and should be, less formal in arbitration than in litigation, because this informality is how arbitration derives its principal advantages.[113] However, the fact that an employment claim is being arbitrated rather than litigated does not diminish the need for complete discovery. Restrictions on discovery fall hardest on employees since the employer already possesses almost all relevant documents and data, such as personnel files and employee demographic information.[114] Employers' attempts to unduly restrict employees' access to adequate discovery should be closely scrutinized by the courts. Employees should not be bound by an arbitration agreement if the terms of that agreement deny them access to relevant documents and information, and, thus, make it impossible for them to prove their case.

V. Written Opinions

In *Gilmer*, the plaintiff argued that arbitration could not adequately protect employees' statutory rights because employment arbitrators are

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111. AAA's employment arbitration Rule 7 provides: "The arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute." AAA NATIONAL RULES, *supra* note 97, at 12-13.

112. *Williams*, 837 F. Supp. at 1439.

113. Marler, *supra* note 38, at 473 n.238, 476; Thomas H. Stewart, *Arbitrating Claims Under the Age Discrimination in Employment Act of 1967*, 59 CINN. L. REV. 1415, 1436-37 (1991).

114. *See* Schwartz, *supra* note 90, at 60; Ronald Turner, *Compulsory Arbitration of Employment Discrimination Claims With Special Reference to the Three A's—Access, Adjudication, and Acceptability*, 31 WAKE FOREST L. REV. 231, 289 (Spring 1996); Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 2670 (June 1996); Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public-Law Disputes*, 4 U. ILL. L. REV. 635, 661-62 (1995); *see also* Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 683-84 (Fall 1996) (emphasizing importance of discovery to consumers when they are arbitrating claims against a company); Mark E. Bunditz, *Arbitrating of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. OF DISP. RESOL. 267, 283-84 (1995) (same).

not required to issue written opinions.[115] This, Gilmer argued, would result in the public being unaware of employers' discriminatory policies.[116] He also argued that it would hamper effective appellate review[117] and stifle development of the law.[118] The *Gilmer* Court held that these concerns did not justify denying enforcement of Gilmer's compulsory arbitration agreement. First, the Court stated that the securities industry arbitration rules require arbitrators to issue written, detailed opinions and to make those opinions publicly available.[119] However, the Court was mistaken. The securities industry arbitration rules require the arbitrator to issue a written *award*, which does little more than state who shall receive what and when the individual shall receive it.[120] The arbitrator is not required to issue an *opinion* giving reasons for the award.[121]

The Court advanced two additional reasons for rejecting Gilmer's argument that his arbitration agreement should not be enforced because of the lack of written arbitral opinions. One reason set forth by

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115. *Gilmer*, 500 U.S. at 31; *see also* United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (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 (2d ed. 1977); *but see* David E. Feller, *Arbitration and the External Law Revisited*, 37 St. Louis U. L.J. 973, 981 (Summer 1993) (stating that, the law notwithstanding, "any labor arbitrator who hears a grievance and then just comes out with an award saying 'grievance denied' or 'grievance granted' will never be hired by any employer or union again.").

116. *Gilmer*, 500 U.S. at 31. Agreeing with Gilmer's argument, one commentator explained:

> 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 103, at 215 (footnotes omitted).

117. *Gilmer*, 500 U.S. at 31; *see also* Cooper, *supra* note 103, at 215-18 (explaining why effective appellate review is hampered).

118. *Gilmer*, 500 U.S. at 31; *see also* Cooper, *supra* note 103, 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).

119. *Gilmer*, 500 U.S. at 31-32.

120. *See* Uniform Code of Arbitration, *reprinted in* SECURITIES INDUS. CONFERENCE ON ARBITRATION REPORT NO. 6, at § 28(e); *see also* GEORGE GOLDBERG, A LAWYER'S GUIDE TO COMMERCIAL ARBITRATION 57-60 (2d ed. 1977) (describing the procedures and content of an arbitration award).

121. *See* Peter M. Muneim, Comment, *The Desirability of Punitive Damages in Securities Arbitration: Challenges Facing the Industry Regulators in the Wake of Mastrobuono*, 144 U. PA. L. REV. 197, 202 (Nov. 1995); Alleyne, *supra* note 90, at 413. AAA requires that its arbitrators issue "written reasons for the award unless the parties agree otherwise." AAA NATIONAL RULES, *supra* note 97, at 25-26 (Rule 32).

the Court was that the courts themselves would continue to issue judicial opinions on employee claims because not all employees are likely to sign binding arbitration agreements.[122] The other reason was that Gilmer's argument was not unique because settlement agreements, which are encouraged by the ADEA and other federal antidiscrimination statutes, similarly fail to produce written opinions.[123]

The Court's mistaken analysis of the securities industry arbitration rules, and its enforcement of Gilmer's arbitration based on that mistaken analysis, makes it unclear whether written arbitral opinions are a prerequisite to obtaining judicial enforcement of employment arbitration agreements. There are four different ways that an employer might draft an arbitration agreement with regard to arbitral opinions. First, the employer could include in the agreement that a written opinion is required in every arbitration. Second, a written opinion may only be required at the request of either party. Third, a written opinion may be required only upon the request of both parties. Finally, a clause could be inserted in the agreement stating that written opinions are prohibited altogether.

The Supreme Court's enforcement of Gilmer's arbitration agreement based on the Court's mistaken assumption that the agreement required the issuance of written opinions should caution employers against adopting the latter two approaches. A prudent employer wishing to maximize the probability that its compulsory arbitration agreement will be enforced should require the arbitrator to issue a written opinion either in all cases or upon either party's request.

Apart from enforcement concerns, there are two additional reasons why written opinions are useful. The first is catharsis. A well-written opinion can convince the parties that the arbitrator heard and understood their positions and that the award is basically sound.[124] If this is the case, the award is less likely to be challenged in court.

The second purpose of opinion writing is to aid judicial review. A reviewing court cannot ascertain whether the arbitrator correctly followed the law unless the arbitrator states the law in writing and applies

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122. *Gilmer*, 500 U.S. at 32.

123. *Id. But see* Cooper, *supra* note 103, at 222 ("settlement is based on a prediction of the outcome of litigation; arbitration [when it is the product of the employer's coercion and the employee's expectation that she will more likely win in arbitration than litigation] is based on an avoidance of the outcome of litigation.").

124. *See Alexander*, 415 U.S. at 51 n.13, 55 (1974) (noting the "therapeutic value" of arbitration); United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960) (same); ELKOURI & ELKOURI, *supra* note 66, at 280-82; Roger I. Abrams, et al., *Arbitral Therapy*, 46 RUTGERS L. REV. 1751, 1756-95 (discussing the therapeutic value of arbitration) (Summer 1994); Susan A. Fitzgibbon, *The Judicial Itch*, 34 ST. LOUIS U. L.J. 485, 506 (Spring 1990) (a written "arbitral opinion contributes to the therapeutic effect on the process and the continuing relationship of the parties by explaining the reasoning behind the award, demonstrating that the arbitrator heard and considered the arguments of each side").

it to the facts of the case.[125] Written opinions are critical to any meaningful judicial review of the substantive matters at issue in a case.

One commentator has suggested that requiring written opinions can operate as a market substitute for judicial review. Speaking in the context of arbitration in the securities industry, Judith Vladeck has suggested that written opinions would expose incompetent arbitrators as "the damn fools that you thought they were," and that parties thereafter would refuse to select them as arbitrators in future cases.[126] Similarly, as discussed in Part II of this article, written opinions that are published and easily accessible can help diminish the informational advantage employers have in arbitrator selection procedures, and can help create a strong incentive for arbitrators to remain impartial.

Courts should refuse to enforce arbitration agreements that do not require arbitrators to issue written opinions either in all cases, or at the request of either party. There are good reasons why the parties may choose to forego a written opinion. One is that the lack of an opinion virtually guarantees the finality of the arbitral award by making substantive review impossible. However, as discussed in the next part of this article, the public interest in ensuring the proper application of employment law underscores the importance of substantively correct arbitral decisions, which cannot be guaranteed absent the opportunity to obtain substantive judicial review. The decision to forego such review to obtain prompt resolution of the dispute should be a joint one, and should not unilaterally be imposed on the employee by the employer.

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125. David Feller, for example writes:

> Review for error in applying a statute is almost impossible if arbitrators, as apparently the Supreme Court will permit them to do, fail to write opinions. In reviewing commercial cases, where opinions are the exception and not the rule, the usual judicial decision involves imagining every possible ground upon which the arbitrator could have reached the result which he did and concluding that there was at least one possible ground for concluding that the arbitrator was arguably construing or applying the contract and not simply imposing his own brand of justice.

David E. Feller, *Fender Bender or Train Wreck?: The Collision Between Statutory Protection of Individual Employee Rights and the Judicial Revision of the Federal Arbitration Act*, 41 St. Louis U. L.J. 561, 572 (Spring 1997); Richard E. Speidel, *Arbitration of Statutory Rights Under the Federal Arbitration Act: The Case for Reform*, 4 OHIO ST. J. ON DISP. RESOL. 157, 198 (1989); *but see* Willemijn Houdstermaatschappij v. Standard Micro, 103 F.3d 9, 12-13 (2d Cir. 1997) ("It is difficult to apply [the manifest disregard] standard of review when arbitrators give no explanation for their decision. . . . However, since arbitrators are not required to provide an explanation . . ., a reviewing court must still perform the difficult task of evaluating the conduct and conclusions of the arbitrators. . . . [In such a case], a reviewing court can only infer from the facts of the case whether the arbitrators appreciated the existence of a clearly governing legal principle but decided to ignore or pay no attention to it.").

126. Judith P. Vladeck & Theodore O. Rogers, *Employment Discrimination*, 63 FORDHAM L. REV. 1613, 1638 (1995).

VI. Judicial Review

Another basis on which compulsory arbitration has been challenged is the limited opportunity of either party for judicial review.[127] 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 [existed] evident partiality or corruption [by] the arbitrators"; where there existed specified misconduct by the arbitrators, or "[w]here the arbitrators exceeded their powers."[128] However, federal courts have tended to add a gloss to these provisions[129] and, in effect, to require that an arbitrator must grant the parties a fundamentally fair hearing.[130] The courts seem to agree that a fundamentally fair hearing requires notice, an opportunity to be heard and to present relevant and material evidence and argument before the arbitrators, and impartiality on the part of the arbitrators.[131]

When an arbitrator is called upon to interpret a clause contained in a commercial contract, or a term in a collective bargaining agreement, she is interpreting "private" law—law contractually created by

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127. *Gilmer*, 500 U.S. at 32 n.4; *see also* Cooper, *supra* note 103, at 216-17.

128. 9 U.S.C. § 10 (1994). For a comprehensive discussion of the standards governing judicial review of arbitral awards, see Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacator of Commercial Arbitration Awards*, 30 GA. L. REV. 731 (Spring 1996).

129. *See* Bowles Fin. Group, Inc. v. Stifel, Nicolaus & Co., 22 F.3d 1010, 1012 (10th Cir. 1994) (noting that these FAA provisions are not interpreted literally); Jenkins v. Prudential-Bache Secs., Inc., 847 F.2d 631, 634 (10th Cir. 1988) (same).

130. *See, e.g.*, Burchell v. Marsh, 58 U.S. 344, 349 (1854) ("[i]f 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 . . . [of] 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) ("review 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) ("an arbitrator need not [observe] all the niceties [of] . . . federal courts . . . . he need only grant the parties hearing").

131. *Bowles*, 22 F.3d at 1013; *see* Robbins v. Day, 954 F.2d 679, 685 (11th Cir.), *cert. denied*, 506 U.S. 870 (1992) ("the Federal Arbitration Act allows arbitration to proceed with only a summary hearing and with restricted inquiry into factual issues"); Employers Ins. of Wausau v. National Union Fire Ins. Co., 933 F.2d 1481, 1491 (9th Cir. 1991) (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 of Am., 823 F.2d 1289, 1295 (9th Cir. 1987) ("a hearing 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.), *cert. denied*, 380 U.S. 988, (1965); *Hoteles Condado Beach*, 763 F.2d at 38-39 (arbitrator must give each party an adequate opportunity to present evidence and arguments).

the parties to govern those parties and no one else. Under these circumstances, it is appropriate to permit parties to agree in advance that the arbitrator's decision will not be appealable because the arbitrator misinterpreted the contract or misconstrued the underlying facts. It is assumed that the parties knew that they were agreeing to limited judicial review when they signed the arbitration agreement, and that, since any arbitral mistake affects only the parties themselves, the parties should be held to their bargain. Parties trading their right to appeal for a faster and less expensive method of dispute resolution should not be permitted to repudiate that bargain if the outcome of their case was not as they had hoped.

When statutory claims are involved, however, there is a public interest in the manner in which the statutory law is interpreted and applied.[132] Title VII, for example, was intended not only to give individual employees private redress for discrimination, but also to "implement the public interest" in obliterating all traces of employment discrimination.[133] Thus, when an arbitration award is challenged based on the arbitrator's purported misapplication of statutory law, "there is a tension between the tradition of limited judicial review of arbitration awards and the presence of an independent public interest in ensuring that the law is correctly and consistently being applied."[134]

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132. Estreicher, *supra* note 52 at 777-78; Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1655 (June 1996) (discussing the public interest underlying employment laws designed to ensure racial and sexual equality); Feller, *supra* note 115, at 983; *see also* Cole v. Burns Int'l Sec. Svcs., 105 F.3d 1465, 1476 (D.C. Cir. 1997) ("The fundamental distinction between contractual rights, which are created, defined, and subject to modification by the same private parties participating in arbitration, and statutory rights, which are created, defined, and subject to modification only by Congress and the courts, suggests the need for a public, rather than private, mechanism of enforcement for statutory rights.").

133. General Tel. Co. v. EEOC, 446 U.S. 318, 326 (1990).

134. Estreicher, *supra* note 52, at 777. David Feller asks: what happens if the parties have stipulated that the arbitration decision shall be final and binding, but the decision is wrong on the legal merits? He concludes that courts are likely to review arbitral decisions concerning statutory claims more closely than courts currently review labor arbitration decisions, because of the "much larger social policies involved." Feller, *supra* note 115, at 982-83.

The D.C. Circuit reached the same conclusion in *Cole*. 105 F.3d at 1487. After noting the pronouncements in *Gilmer* that "by 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," and 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," the circuit court concluded that "[t]hese twin assumptions regarding the arbitration of statutory claims are valid only if judicial review under the 'manifest disregard of the law' standard is sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law." *Id.* Additionally, the court stated that a higher standard of review would not significantly undermine the finality of arbitration because most employment discrimination claims center on factual, rather than legal, disputes. *Id.* For further discussion of this point, see Chisolm v. Kidder, Peabody Asset Management, Inc., 966 F. Supp. 218, 222-27 (S.D.N.Y. 1997) (discussing whether "manifest disregard" standard should be applied differently for claims asserting statutory rights, but deciding that factual nature of dispute made resolution of that issue unnecessary); Martin H. Malin, *Arbitrating Statutory Claims in*

The Supreme Court considered this tension in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[135] In *Mitsubishi*, the Court distinguished pre-arbitration attempts to avoid enforcing an arbitration agreement from post-arbitration attempts to vacate an award. Regarding the former, the Court held that the FAA requires a presumption that the arbitrator will decide the dispute in accordance with applicable law.[136] The mere possibility that an arbitrator will misapply the law, therefore, will not serve as a basis for refusing to enforce an arbitration agreement.[137]

On the other hand, the argument that an arbitral decision already rendered is based on a misapplication of the law may justify a court's vacation of the award. To this end, the Court stated that "the national courts of the United States will have the opportunity . . . to ensure that the legitimate interest in the enforcement of . . . [statutory] laws has been addressed."[138] The Court stopped far short, however, of indicating that an arbitral award would be reviewable for factual or legal error in the same way as an adjudication by a trial court: "While the efficacy of the arbitral process requires that substantive review at the award enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the [statutory] claims and actually decided them."[139] This language seems to imply that courts will examine arbitral awards only to ensure that statutory issues were considered and decided, which is markedly different from "ensur[ing] that the legitimate interest in the enforcement of [statutory] laws has been addressed."

The lower courts, in reviewing arbitral decisions involving statutory claims, have refused to reverse such an award based on the "mere" fact that the arbitrator incorrectly interpreted or applied the law.[140] Instead, courts have stated that they only will reverse an arbitrator's award if

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the Aftermath of Gilmer, 40 ST. LOUIS U. L.J. 77, 104 (Winter 1996); Michele Hoyman and Lamont E. Stallworth, *The Arbitration of Discrimination Grievances in the Aftermath of* Gardner-Denver, 39 ARB. J. 49, 53 (Sept. 1984).

135. 473 U.S. 614 (1985).

136. *Mitsubishi Motors,* 473 U.S. at 636-37.

137. *See id.* at 637.

138. *Id.* at 638.

139. *Id.*

140. *See, e.g.*, DiRussa v. Dean Witter Reynolds Inc., 121 F.3d 818, 821-22 (2d Cir. 1997) (refusing to vacate arbitral award despite arbitrators' failure to award attorney's fees as required by statute; "there [was] no persuasive evidence that the arbitrators actually knew of—and intentionally disregarded—the mandatory aspect of the [statute's fee-shifting] provision."); Gingiss Int'l, Inc. v. Bormet, 58 F.3d 328, 333 (7th Cir. 1995); Ainsworth v. Skurnick, 960 F.2d 939, 940 (11th Cir. 1992), *cert. denied*, 507 U.S. 915 (1993); Robbins v. Day, 954 F.2d 679, 683 (11th Cir. 1992), *cert. denied*, 506 U.S. 870 (1992); National R.R. Passenger Corp. v. Chesapeake & Ohio Ry. Co., 551 F.2d 136, 143 (7th Cir. 1977); Republic of Korea v. New York Navigation Co., Inc., 469 F.2d 377 (2d Cir. 1972); Regina M. Lyons Testamentary Trust v. Shearson Lehman Hutton, Inc., 809 F. Supp. 302 (S.D.N.Y. 1993).

the arbitrator acted in "manifest disregard of the law."[141] This standard—a judicially-created addition to the statutory grounds set forth in the FAA for vacating an award[142]—requires a showing that "the arbitrator 'understood and correctly stated the law but proceeded to ignore it.' "[143] Curiously, although dozens of cases discuss and define the "manifest disregard" standard, no arbitration award has ever been vacated on this ground.[144]

A more liberal standard of review has been proposed in the Model Employment Termination Act (META).[145] META prohibits the discharge of covered employees except for "good cause,"[146] but limits damages[147] and recommends that all workplace disputes be resolved by binding arbitration.[148] It limits judicial review of arbitral awards to such grounds as fraud and corruption, an abuse of authority by the arbitrator, or a prejudicial error of law.[149] This "prejudicial error of law" standard

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141. The manifest disregard of the law standard was first mentioned in dictum by the Supreme Court in Wilko v. Swan, 346 U.S. 427, 436-37 (1953). The Court in *Wilko* recognized that courts have limited power to vacate arbitration awards, but stated that:

> [w]hile it may be true . . . that a failure of the arbitrators to decide in accordance with [applicable law] would 'constitute grounds for vacating the award pursuant to Section 10 of the Federal Arbitration Act,' that failure would need to be made clearly to appear . . . [T]he interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation."

Wilko, 346 U.S. at 436-37 (footnotes omitted).

142. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jarros, 70 F.3d 418, 421 (6th Cir. 1995); Folkways Music Publishers, Inc. v. Weiss, 989 F.2d 108, 111 (2d Cir. 1993); Carte Blanche (Singapore) PTE., Ltd. v. Carte Blanche Int'l, Ltd., 888 F.2d 260, 265 (2d Cir. 1989); O.R. Sec., Inc. v. Professional Planning Assoc., Inc., 857 F.2d 742, 746 (11th Cir. 1988); First Interregional Equity Corp. v. Haughton, 842 F. Supp. 105, 108 (S.D.N.Y. 1994); Pompano-Windy City Partners Ltd. v. Bear Stearns & Co., Inc., 794 F. Supp. 1265, 1272 (S.D.N.Y. 1992).

143. Siegel v. Titan Indus. Corp., 779 F.2d 891, 892-93 (2d Cir. 1985) (citations omitted). *See also* Prudential Bache Sec., Inc. v. Tanner, 72 F.3d 234, 239 (1st Cir. 1995); Health Servs. Management Corp. v. Hughes, 975 F.2d 1253, 1267 (7th Cir. 1992) (to vacate an arbitration award for manifest disregard of the law, "it must be demonstrated that the majority of arbitrators deliberately disregarded what they knew to be the law in order to reach the result they did."); Marshall v. Green Giant Co., 942 F.2d 539, 550 (8th Cir. 1991); Advest Inc. v. McCarthy, 914 F.2d 6, 9 (1st Cir. 1990) (finding that brokerage house failed to show that arbitrators manifestly disregarded law when they ordered restoration as part of remedy for wrongful liquidation of investor's holdings); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986); San Martine Compania de Navegacion v. Saguenay Terminals, Ltd., 293 F.2d 796, 801 (9th Cir. 1961); *but see* R.M. Perez & Assoc., Inc. v. Welch, 960 F.2d 534, 539 (5th Cir. 1992) (noting that "this circuit never has employed a 'manifest disregard of the law' standard in reviewing arbitration awards").

144. Hayford, *supra* note 128, at 776; Brad A. Glabraith, Note, *Vacator of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the "Manifest Disregard of the Law" Standard*, 27 IND. L. REV. 241, 252 (1993).

145. Model Employment Termination Act § 1-14 (1991).

146. *Id.* §§ 1(4), 3(a).

147. *Id.* § 7(b).

148. *Id.* § 6.

149. *Id.* § 8(c).

is significantly broader than the "manifest disregard" standard that courts have used in the context of either collective bargaining or the FAA for vacating an arbitrator's award because the arbitrator misinterpreted or misapplied the law.[150] The META standard would permit a court to reverse any arbitration decision where the arbitrator's incorrect interpretation or application of the law adversely affects the rights of a party, making appellate review of arbitration awards significantly more common.

One commentator has asserted that imposing an appellate system on employment arbitration would, by obviating the finality of the award and guaranteeing a lengthy and expensive appellate process, defeat the primary purposes of arbitration.[151] While this may be true, it is equally true that the current absence of arbitral opinions and the narrow review standard frustrate the public interest in ensuring the correct application of statutory employment laws. A different approach would better serve both the purpose of arbitration and the public interest. Arbitrators should be required to issue written opinions containing findings of fact and conclusions of law, and an accessible record of the proceedings should be available.[152] The opinions should be made publicly available and easily accessible. Courts should continue to apply the "manifest disregard of the law" standard, which will ensure that the most egregious errors of law are corrected while avoiding a post-arbitration stampede to the courthouse.[153] The accessibility of arbitral opinions will ensure, as Vladeck suggests, that parties to future arbitrations are able to screen out potential arbitrators whose arbitral records demonstrate that they are incapable of correctly applying the law.

VII. The Arbitrator's Ability to Award Relief

Employment arbitration agreements also have been criticized because of the limited authority of arbitrators to award relief. Prior to the decision in *Gilmer*, Professor Richard Shell wrote 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

150. Theodore J. St. Antoine, *The Making of the Model Employment Termination Act*, 69 WASH. L. REV. 361, 378 (1994); Theodore J. St. Antoine, *Employment-At-Will—Is the Model Act the Answer?*, 23 STETSON L. REV. 179, 194 (1993).

151. Judith P. Vladeck & Theodore O. Rogers, *Employment Discrimination*, 63 FORDHAM L. REV. 1613, 1638 (1995). *See also* Chisolm v. Kidder, Peabody Asset Management, Inc., 966 F. Supp. 218, 227 (S.D.N.Y. 1997) ("[J]udicial oversight could well damage the integrity of the arbitral proceeding, as parties would be less likely to enter into beneficial agreements providing for speedy dispute resolution through arbitration when they may be forced to reargue the entire matter in court.").

152. Estreicher, *supra* note 52, at 778 n.74.

153. *Cf.* Malin, *supra* note 91, at 99-105 (arguing that courts should review arbitral interpretations of law on a *de novo* basis).

or making sweeping institutional reforms."[154] Shell, thus, concluded that securities arbitration procedures "simply would not be suited to implementing the systemic, institutional interests embodied in Title VII."[155]

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 the securities industry's arbitration rules at issue in *Gilmer* granted arbitrators the authority to award equitable relief and to hear class actions.[156] The Court further opined that even if such authority were lacking, it would not justify a conclusion that arbitral procedures were inadequate to protect employees' statutory rights.[157]

Many federal employment antidiscrimination statutes, as well as most state common law torts, authorize punitive damage awards. As a countermeasure, some employers, when implementing employment arbitration systems, have inserted clauses that limit arbitrators' authority to award punitive and other types of damages.[158] 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, by contractual agreement, her right to seek the specified types of damages. As Judge Richard Posner pointed out in *Bararati v. Josephthal, Lyon & Ross, Inc.*:

> short 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 adjudica-

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154. G. Richard Shell, *ERISA and Other Federal Employment Statutes: When Is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 TEX. L. REV. 509, 568 (1990).

155. *Id.*

156. *Gilmer*, 500 U.S. at 32.

157. *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. CDC Int'l Inc., 877 F.2d 221, 241 (3d Cir. 1989)). The Court also noted that arbitration agreements would not preclude the EEOC from bringing actions seeking class-wide and equitable relief. *Id.* However, the EEOC threat is not particularly potent because the agency files suit in so few of the complaints it receives.

158. Richard A. Bales & Reagan Burch, *The Future of Employment Arbitration in the Nonunion Sector*, 45 LAB. L. J. 627, 633 (1994); Jacobs, *supra* note 31, at B5; *see also* Jill Hodges, *EEOC Argues Against Hubbard Policy; Race Discrimination Suit Questions KSTP-TV's Employment Agreement*, STAR TRIBUNE, May 18, 1996 at 1D (noting that a television station had requested employees to sign an agreement limiting recovery to "out of pocket damages").

> tion have considerable power to vary the normal procedures, and surely can stipulate that punitive damages will not be awarded.[159]

Advocates of this approach square it with the FAA by interpreting the FAA as a mandate to courts requiring enforcement of all arbitration agreements "according to the terms of the parties' agreement,"[160] regardless of what those terms might be.

But what if an arbitration agreement stipulates that an employee "agrees to submit all employment disputes, including discrimination claims, to binding arbitration provided, however, that the arbitrator may award no relief for any claim based on sex discrimination"? Has the employee waived her opportunity to pursue a sex discrimination claim? Clearly not. Because Title VII vests in employees certain rights that are nonwaiveable,[161] a prospective waiver of substantive Title VII rights is unenforceable under well-established Title VII case law.[162] So what of a prospective waiver of the right to seek certain types of damages? Although *Gilmer* makes it clear that parties to an employment agreement prospectively may waive or alter certain statutory procedures for enforcing substantive Title VII rights (such as the right to sue in court), it is less clear whether *Gilmer* authorizes the parties prospectively to waive their Title VII right to seek statutorily authorized categories of damages.

A clue may lie in the Court's statement in *Gilmer* 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."[163] Although the Court here is referring to arbitration under the FAA, this interpretation of the FAA coincides nicely with the Title VII distinction between substantive rights, which are not prospectively waiveable, and procedural rights, which are. This substantive/procedural distinction gives the Court an

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159. 28 F.3d 704, 709 (7th Cir. 1994) (citations omitted).

160. Heather J. Haase, Note, *In Defense of Parties' Rights to Limit Arbitral Awards Under the Federal Arbitration Act:* Mastrobuono v. Shearson Lehman Hutton, Inc., 31 WAKE FOREST L. REV. 309, 331 (1996); *see also* Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 479 (1989) (by permitting courts to "rigorously enforce such agreements according to their terms . . . we give effect to the contractual rights and expectations of the parties without doing violence to the policies behind the FAA").

161. *See Alexander*, 415 U.S. at 52 n.15 (1974).

162. *See, e.g.* Schwartz v. Florida Bd. of Regents, 807 F.2d 901, 906 (11th Cir. 1987) (sex discrimination claim); Rogers v. General Elec. Co., 781 F.2d 452, 454 (5th Cir. 1986) (sex discrimination claim); Williams v. Vukovich, 720 F.2d 909, 926 (6th Cir. 1983) (racial discrimination claim). *See also* United States v. Allegheny-Ludlum Indus., Inc. 517 F.2d 826, 853 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); Watkins v. Scott Paper Co., 530 F.2d 1159, 1172 (5th Cir.), *cert. denied*, 429 U.S. 861 (1976); Cox v. Allied Chem. Corp., 538 F.2d 1094, 1098 (5th Cir. 1976), *cert. denied sub nom.* Allied Chem. Corp. v. White, 434 U.S. 1051 (1978); Baker v. Chicago Fire & Burglary Detection, Inc., 489 F.2d 953, 955-56 (7th Cir. 1973).

163. *Gilmer*, 500 U.S. at 26 (alteration in original) (quoting *Mitsubishi*, 473 U.S. at 628).

easy way to reconcile its interpretation of the FAA in *Gilmer* with its prior interpretations of Title VII.

So, is the statutory right to seek punitive damages a nonwaiveable substantive right, or a waiveable procedural one? In the 1995 decision of *Mastrobuono v. Shearson Lehman Hutton, Inc.*,[164] the Court held that such a right is a substantive right.[165] Nonetheless, the decision itself can be interpreted as inconsistent with the proposition that the right to seek punitive damages is inherently nonwaiveable. In *Mastrobuono*, the Mastrobuonos sued Shearson under various securities laws, claiming that Shearson had churned their account. After the trial court ordered the parties to arbitrate the dispute in accordance with an arbitration agreement the couple had signed, the case was arbitrated. The arbitrator issued a decision in favor of the Mastrobuonos, awarding them both compensatory and punitive damages. Shearson then moved to vacate the punitive damages portion of the award on the ground that the arbitration agreement contained a choice of law provision designating that the agreement would be construed in accordance with the law of New York, and New York law prohibited arbitrators from awarding punitive damages. The Supreme Court held that the arbitration agreement was ambiguous as to whether the arbitrator would be permitted to award punitive damages, and that this ambiguity should be resolved in favor of the Mastrobuonos.[166] The Court, therefore, held that the arbitrator retained the authority to award punitive damages, and reinstated the punitive damages part of the award.[167]

Because the decision was based on ambiguity in the particular arbitration agreement, the decision is an extremely narrow one, applicable only to the specific contract at issue in *Mastrobuono* and to no other.[168] Moreover, the Court specifically distinguished the situation in *Mastrobuono* from the one that most often arises in the context of employer arbitration agreements: a clause drafted by the employer that explicitly forbids the arbitrator from awarding punitive damages. The Court noted that "[a]s a practical matter, it seems unlikely that petitioners . . . had any idea that by signing a standard-form agreement to arbitrate disputes[,] they might be giving up an important substantive right," such as the right to seek punitive damages.[169]

Instead of basing its decision on the narrow ground of ambiguity in the contract, the Court instead could have held that the right to seek punitive damages is inherently nonwaiveable. It is possible, therefore,

164. 115 S. Ct. 1212 (1995).
165. *Mastrobuono*, 115 S. Ct. at 1219.
166. *Id.* at 1218-19.
167. *Id.* at 1219.
168. *Id.* at 1223 (Thomas, J., dissenting).
169. *Id.* at 1219.

that the Court might enforce a clear waiver of punitive damages. This proposition, however, is speculative. The underlying claim in *Mastrobuono* was based on securities law, not Title VII. The strong Title VII case precedent establishing the nonwaiveability of substantive rights might easily convince the Court to interpret the FAA consistently with Title VII. Therefore, by calling the right to seek punitive damages a substantive right, the Court may have paved the way for a later decision to equate "substantive" with "nonwaiveable."

Assuming that statutorily permitted categories of damages are nonwaiveable, the issue turns to whether such damages, when purportedly (though ineffectively) "waived" by agreement, may be awarded by the arbitrator, or whether they may (or must) be awarded by a court. In *Mastrobuono*, that decision was easy because the purported waiver of punitive damages operated through a choice of law provision rather than an explicit waiver. If, however, a waiver were to state, "The Arbitrator shall have no authority to award punitive damages," a court could not simply strike the waiver and order that the punitive damages issue be submitted to arbitration. This is because any award of punitive damages by the arbitrator would exceed the scope of the arbitrator's contractual authority, and this is a statutory ground for vacating an arbitral award.

To date, the majority of courts that have addressed the issue of the arbitrator's authority to award punitive damages have held that a party with a statutory right to seek punitive damages may do so notwithstanding an arbitral agreement to limit damages.[170] In order to resolve the situation, the first option available to courts is to sever the punitive damage claim from the rest of the case, require the parties to submit the nonpunitive damages part of the case to arbitration, and stay the punitive damages part for resolution by the court after an arbitration award has been made. This approach has been adopted by several New York courts confronted with this issue.[171]

An example of a court adopting the New York approach is *Kinnebrew v. Gulf Insurance Co.*[172] In *Kinnebrew*, the United States District Court

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170. This issue has arisen several times in New York, where state law forbids an arbitrator to award punitive damages. *See* 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, 930 (N.Y. Sup. Ct. 1992) (permitting arbitrator to award punitive damages in a disability discrimination claim).

171. *See, e.g.*, DiCrisci v. Lyndon Guar. Bank of N.Y., 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); *see also* Marler, *supra* note 38, at 478 (arguing that arbitrators in this situation should resolve all liability issues, then send the case to a judicial forum for resolution of all damages issues).

172. 67 Fair Empl. Prac. Cas. (BNA) 189 (N.D. Tex. 1994).

for the Northern District of Texas ordered plaintiff's claims under the federal Equal Pay Act[173] and the Texas Commission on Human Rights Act[174] to arbitration, even though the arbitration agreement did not provide for the award of punitive damages, attorneys' fees, or equitable relief.[175] The court reasoned that an employee's right to such relief was not a "substantive" right and, therefore, was waiveable.[176] (This reasoning probably will not survive *Mastrobuono*.) However, by retaining jurisdiction in the case "to consider any statutory remedies to which [a] plaintiff is entitled after arbitration is completed,"[177] the court left open the possibility that it would allow the employee to recover these types of relief in a subsequent judicial action.

A second option for courts faced with an arbitration agreement containing a "no authority to award punitive damages" clause is to strike the arbitration clause altogether and allow the entire claim to be litigated. The Ninth Circuit adopted this option in *Graham Oil Co. v. Arco Products Co.*,[178] which involved a suit by a gasoline retailer alleging that its supplier unlawfully raised its prices in violation of the Petroleum Marketing Practices Act (PMPA).[179] 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"[180] In this case, however, the court held that the arbitration agreement expressly forfeited the retailer's statutory right to recover punitive damages and attorneys' fees and altered the statute of limitations.[181] Noting that the purpose of the PMPA was to protect retailers from the "dominant economic power" exercised by suppliers,[182] the court declined to sever the offending provisions and, instead, refused to

173. 29 U.S.C. § 206(d) (1994).
174. TEX. LAB. CODE ANN. §§ 21.001-306 (Vernon 1996).
175. *Kinnebrew*, 67 Fair Empl. Prac. Cas. at 190.
176. *Id.*
177. *Id.* at 191.
178. 43 F.3d 1244, 1246 (9th Cir. 1994); *see also* Stirlen v. Supercuts, Inc., 60 Cal.Rptr.2d 138 (Cal. Dist. Ct. App. 1997) (striking as unconscionable an arbitration agreement which withdrew from employees the right to recover punitive damages); *but see* Great Western Mortgage Corp. v. Peacock, 110 F.3d 222, 232 (3d Cir. 1997) (the waiver in an arbitration agreement of the right to recover punitive damages "is separate and apart from the issue of whether an employee has agreed to an arbitral forum, and hence, is for the arbitrator to decide.").
179. 15 U.S.C. §§ 2801-06 (1994).
180. *Graham Oil*, 43 F.3d at 1247.
181. *Id.* at 1247-48.
182. *Id.* at 1247.

enforce the arbitration agreement, permitting the retailer to seek redress for all its claims in court.[183]

The Ninth Circuit did not indicate in *Graham* whether its treatment of the arbitration clause necessarily would be the same in cases not involving the PMPA, such as employment cases. At least one court has indicated, however, that an arbitration agreement could be struck in its entirety because the agreement does not permit statutorily authorized damages. In *Johnson v. Hubbard Broadcasting, Inc.*,[184] Johnson, a former employee claiming sexual harassment under Title VII, urged the court to invalidate the agreement on the ground that its remedy provisions were inconsistent with her Title VII rights. The arbitration agreement at issue allegedly would have limited Johnson's award to out-of-pocket damages (as interpreted by the employer, the agreement permitted economic damages such as back pay and lost benefits but excluded punitive damages and damages for pain and suffering) and forbade any award of attorneys' fees.[185] The Federal District Court for the District of Minnesota compelled arbitration of the claim pending the arbitrator's determining the meaning of the damage limitations. In doing so, however, the court stated that "should the arbitrator find that the terms of the arbitration agreement deny Johnson the opportunity to recover the full array of statutory remedies available under state and federal law, the agreement would contravene federally and state established remedial measures, possibly rendering the agreement unenforceable as unconscionable."[186]

The New York approach is more consistent than the Ninth Circuit's method with current law favoring enforcement of arbitration agreements. The New York approach preserves the employees' statutory right to enumerated damages while enforcing an agreement to arbitrate the merits 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 previously there was only one; 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.[187] As a result, it likely

183. *Id.* at 1249.

184. 940 F. Supp. 1447 (D. Minn. 1996).

185. The employee also challenged the agreement for imposing a 180-day statute of limitations on the filing of an EEOC charge. The normal statute of limitations is 300 days.

186. *Johnson*, 940 F. Supp. at 1462.

187. *See* Shearson Lehman Hutton, Inc. v. McKay, 763 S.W.2d 934, 939 (Tex. Ct. App. 1989) ("Once forced to trial, the benefits of arbitration are forever lost: the speed and economy of first going to arbitration are defeated.").

will take only a few rulings in this direction to convince employers not to attempt to limit arbitral relief.

VIII. Conclusion

Although compulsory employment arbitration is finding increasing favor in the courts generally, courts are unlikely to enforce agreements that unfairly hinder an employee's ability to obtain redress for legitimate claims.[188] At a minimum, a compulsory arbitration 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. It should permit both parties to participate equally in the selection of arbitrators either by mutual choice or from a pool of disinterested neutrals. It should permit ample discovery, including document production, information requests, depositions, and subpoenas. The arbitration agreement should require the arbitrator to issue a written opinion. It should not attempt to limit the arbitrator's ability to award relief by, for example, forbidding an award of punitive damages or attorneys' fees. In short, the arbitral process that is substituted for litigation should be, in appearance as well as substance, scrupulously fair to the employee.

188. Richard A. Bales, *Compulsory Arbitration of Employment Claims: A Practical Guide to Designing and Implementing Enforceable Agreements*, 47 BAYLOR L. REV. 591, 595 (1995).

Appendix A

Employment Agreement

The parties agree that employment is at-will, and that either party may terminate the employment relationship at any time for any or no reason. Any agreement abrogating the at-will relationship must be in writing and signed by both employee and employer.

The parties further agree that any legal or equitable claims or disputes arising out of or in connection with the employment, the terms and conditions of employment, or the termination of employment will be settled by binding arbitration. This agreement applies to the following allegations, disputes, and claims for relief, but is not limited to those listed: wrongful discharge under statutory law and common law; employment discrimination based on federal, state or local statute, ordinance, or governmental regulations; retaliatory discharge or other action; compensation disputes; tortious conduct; contractual violations (although no contractual relationship, other than at-will employment and this agreement to arbitrate, is hereby created); ERISA violations; and other statutory and common law claims and disputes, regardless of whether the statute was enacted or whether the common law doctrine was recognized at the time this Agreement was signed.

The arbitration proceedings shall be conducted in [city, state] in accordance with the National Rules for the Resolution of Employment Disputes (National Rules) of the American Arbitration Association (AAA) in effect at the time a demand for arbitration is made. The employee is entitled to representation by an attorney throughout the proceedings at his or her own expense; however, the employer agrees not to use an attorney in the arbitration hearing if the employee agrees to the same.

One arbitrator shall be used and shall be chosen by mutual agreement of the parties. If, within thirty days after the employee notifies the employer of an arbitrable dispute, no arbitrator has been chosen, an arbitrator shall be chosen by AAA pursuant to its National Rules. The arbitrator shall coordinate and limit as appropriate all prearbitral discovery, which shall include document production, information requests, and depositions. The arbitrator shall issue a written decision and award, stating the reasons therefor. The decision and award shall be exclusive, final, and binding on both parties, their heirs, executors, administrators, successors, and assigns. The costs and expenses of the arbitration shall be borne evenly by the parties.

The parties understand that by signing this agreement, they are agreeing to substitute one legitimate dispute resolution forum (arbitration) for another (litigation), and thereby are waiving their right to have their disputes resolved in court. This substitution involves no surrender,

by either party, of any substantive statutory or common law benefit, protection, or defense.

The parties agree that this is not intended to add to, create, or imply any contractual or other right of employment. The parties' employment relationship is at-will, and no other inference is to be drawn from this Agreement.

Employee	(Date)	Employer	(Date)