

# EXTENDING OWBPA NOTICE AND CONSENT PROTECTIONS TO ARBITRATION AGREEMENTS INVOLVING EMPLOYEES AND CONSUMERS

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## ABSTRACT

*The Federal Arbitration Act (“FAA”) was created in 1925 to permit judicial enforcement of arbitration agreements covering commercial contract disputes between parties with roughly equal bargaining power. Today, however, the FAA is the legal authority for judicial enforcement of arbitration agreements covering not only contractual claims but also statutory claims, and not only of disputes between commercial entities but also disputes involving parties with grossly disparate bargaining power such as companies and employees/consumers. Moreover, the Supreme Court has interpreted the FAA as strongly favoring arbitration, and the Court has used preemption analysis to restrict the ability of states to regulate arbitration agreements. This has led many commentators to argue that the FAA is ill-suited to its new use—that it is unfair to permit companies to foist arbitration agreements on employees and consumers who have little understanding of what they are signing, and in any event have no meaningful choice if they want the job or product or service the company is offering.*

*In 1990, Congress faced a similar problem in a different context. Congress was amending the Age Discrimination in Employment Act (“ADEA”) to prohibit employers from discriminating on the basis of age in the administration of employee benefit plans. Congress wished to give employees the ability to agree to early retirement and to settle benefits claims, but was concerned that employers would coerce older employees into accepting grossly unfair agreements that the employees did not understand. Congress responded by passing the Older Workers Benefit Protection Act (“OWBPA”). The OWBPA presumes that a waiver of ADEA rights is not knowing and voluntary (and therefore is unenforceable) unless certain procedural requirements are met. For example, the waiver must be written in a manner calculated to be understood by an average employee, the employer must advise the employee in writing to consult with an attorney prior to signing the agreement, and*

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*the employer must give the employee at least twenty-one days within which to consider the agreement.*

*This Article argues that Congress should amend the FAA to add suitably-modified OWBPA-like notice requirements to arbitration agreements directed at most employees and consumers. This approach will help ensure that employees and consumers understand what it is they are signing, and thereby may encourage some companies to draft arbitration agreements that are substantively more balanced. This approach is not, however, a panacea that will cure all the ills of arbitration, but instead is designed as a politically feasible, incremental improvement on employment and consumer arbitration.*

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## I. INTRODUCTION

[Our] liberties . . . cannot but subsist so long as this *palladium* remains sacred and inviolate, not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it.<sup>1</sup>

The Seventh Amendment right to a jury trial is one of the most treasured rights guaranteed by the United States Constitution. William Blackstone remarked that trial by jury is "a privilege of the highest and most beneficial nature."<sup>2</sup> This fundamental right was so valued and protected by the founders of the United States that a person would have found it difficult to waive during the nineteenth century, and enforcement of such a waiver was extremely rare.<sup>3</sup>

However, within the past century, agreements to arbitrate (containing, at least implicitly, a jury trial waiver) became not only enforceable but part of the normal course of business in both private and commercial arenas. In 1925, Congress passed the Federal Arbitration Act ("FAA") to permit judicial enforcement of arbitration agreements covering commercial contract disputes between parties with roughly equal bargaining power.<sup>4</sup> Since then, the

<sup>1</sup> WILLIAM BLACKSTONE, 4 COMMENTARIES \*343.

<sup>2</sup> WILLIAM BLACKSTONE, 3 COMMENTARIES \*349-50.

<sup>3</sup> IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 4.1.2, at 4:4 (1994).

<sup>4</sup> Matthew W. Finkin, "Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification, 17 BERKELEY J. EMP. & LAB. L. 282, 296 (1996); Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Con-*

Supreme Court has been very deferential toward parties contracting for arbitration, stressing that because arbitration “is a matter of consent, not coercion, . . . parties are generally free to structure their arbitration agreements as they see fit.”<sup>5</sup> At the same time, the Court has forbidden the states from regulating the formation of arbitration agreements, holding that the FAA preempts any state law targeted specifically at arbitration agreements even if the purpose of the law is to promote the knowing choice of arbitration.<sup>6</sup>

Today, the FAA is the legal authority for judicial enforcement of arbitration agreements covering not only contractual claims but also statutory claims, and not only of disputes between commercial entities but also disputes involving parties with little or no bargaining power,<sup>7</sup> such as employees and consumers. Many commentators have argued that the FAA is ill-suited to its new use. These commentators have argued, for example, that it is unfair and inconsistent with the federal and state guarantees of a right to trial by jury to permit companies to foist arbitration agreements on employees and consumers who have little understanding of what they are signing, and in any event have no meaningful choice if they want the job or product or service the company is offering.<sup>8</sup>

Arguments against employment and consumer arbitration generally come in one of two forms. The first is that there is a failure in the *process* by which the agreements are formed—e.g., many employees and consumers do not understand what they are signing, or they lack a meaningful choice as to whether to accept such an agreement. The second type of argument criticizes the substantive terms of employment and consumer arbitration agreements—e.g., many agreements impose onerous arbitration fees on employees and consumers, or restrict awardable damages. This Article focuses on the first type of

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*stitutional Rights*, 67 LAW & CONTEMP. PROBS. 167, 176-80 (2004). The statute originally was proposed by the American Bar Association’s Committee on Commerce, Trade, and Commercial Law. *Arbitration of Interstate Commercial Disputes: Joint Hearings Before the Subcomm. of the Comm. on the Judiciary*, 68th Cong. 21 (1924). In response to an objection that the bill would be used to compel arbitration of labor disputes, the Chair of the Committee stated that the intent of the statute was “to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it.” *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Arbitration: Hearing Before the Subcomm. of the Comm. on the Judiciary*, 67th Cong. 9 (1923).

<sup>5</sup> *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

<sup>6</sup> *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 & n.3, 688 (1996).

<sup>7</sup> See Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931 (1999) (arguing that privatization of law through arbitration is bad, particularly when the parties occupy vastly different positions of bargaining power).

<sup>8</sup> Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, 38 U.S.F. L. REV. 17 (2003) [hereinafter Sternlight, *The Rise and Spread*]; Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669 (2001) [hereinafter Sternlight, *Mandatory Binding Arbitration*].

argument, and more particularly on the argument that arbitration agreements often suffer from a lack of adequate notice and consent.<sup>9</sup>

In 1990, Congress faced a similar problem in a different context. Congress was amending the Age Discrimination in Employment Act (“ADEA”) to prohibit employers from discriminating on the basis of age in their administration of employee benefit plans. Congress wished to give employees the ability to agree to early retirement and to settle benefits claims, but was concerned that employers would coerce older employees into accepting grossly unfair agreements that the employees did not understand. Congress responded by passing the Older Workers Benefit Protection Act (“OWBPA”).<sup>10</sup> The OWBPA presumes that a waiver of ADEA rights is not knowing and voluntary (and therefore is unenforceable) unless certain procedural requirements are met. For example, the waiver must be written in a manner calculated to be understood by an average employee, the employer must advise the employee in writing to consult with an attorney prior to signing the agreement, and the employer must give the employee at least twenty-one days within which to consider the agreement.

This Article argues that Congress should amend the FAA to add suitably-modified OWBPA-like notice requirements to arbitration agreements directed at most employees and consumers. This approach will help ensure that employees and consumers understand what it is they are signing, and thereby may encourage some companies to draft arbitration agreements that are substantively more balanced. This approach is not, however, a panacea that will cure all the ills of arbitration. It does not, for example, directly address the many substantive terms of an arbitration agreement that can be drafted to overwhelmingly favor the company.<sup>11</sup> Instead, it is designed to be a politically feasible, incremental improvement on employment and consumer arbitration as it exists today.

Part II of this Article explains the Supreme Court’s journey from near total rejection of mandatory arbitration agreements to its strong preference for enforcing such agreements. Part III explains the various notice and consent standards currently used by courts in evaluating the enforceability of employment and consumer arbitration agreements. First, analysis of the “knowing and voluntary” standard will set the framework for understanding how courts began to approach notice of arbitration agreements. Second, the Ninth Circuit’s use of the “where appropriate” standard will provide an example of the minority approach to arbitration agreements. Third, an examination of the majority approach of applying state contract law to arbitration agreements will show how courts enforce arbitration agreements just as they do other standard-form adhesive contracts. Finally, the application of a civil jury trial waiver to such agreements will show how some courts have viewed arbitration agreements as

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<sup>9</sup> For a detailed description of notice and consent issues in employment arbitration, see Richard A. Bales, *Contract Formation Issues in Employment Arbitration*, 44 BRANDEIS L.J. 415, 435-50 (2006).

<sup>10</sup> 29 U.S.C. § 623 (2000).

<sup>11</sup> See, e.g., Richard A. Bales, *The Laissez-Faire Arbitration Market and the Need for a Uniform Federal Standard Governing Employment and Consumer Arbitration*, 52 U. KAN. L. REV. 583, 606-08 (2004).

a waiver of a person's Seventh Amendment right to a jury trial and have attempted to raise the standard for enforcement.

Part IV examines the OWBPA standard and how it could be modified and applied to employment and consumer arbitration.<sup>12</sup> The OWBPA's heightened notice standard protects workers close to retirement from waiving prospective claims against an employer without knowing and voluntary consent to the waiver provision. This higher notice standard has not dampened enthusiasm for age discrimination waiver clauses—it has simply ensured that employees who sign such clauses have a reasonable opportunity to understand what it is they are signing. This Article argues that a similar effect can be obtained for employment and consumer arbitration agreements. Moreover, such a standard would benefit employees, consumers, and companies by providing a much clearer and more consistent standard for the enforcement of arbitration agreements.

## II. BACKGROUND

This Part begins by discussing the trend of judicial acceptance of arbitration agreements. Second, this Part will examine the common law jury trial waiver and its roots in the Seventh Amendment. Finally, this Part will contrast the jury trial waiver with the modern trend of arbitral contractualism.

### A. *The FAA and Supreme Court Cases*

Historically, common law courts were hostile to arbitration agreements.<sup>13</sup> In 1925, Congress responded by enacting the Federal Arbitration Act, which required courts to enforce arbitration agreements related to commerce and maritime transactions.<sup>14</sup> However, in the 1953 decision of *Wilko v. Swan*,<sup>15</sup> the Supreme Court held that an arbitration clause invoked in connection with a Securities Act<sup>16</sup> fraud claim was void as an invalid waiver of the substantive statutory law. Lower federal courts subsequently interpreted *Wilko* as creating a "public policy" defense to the enforcement of arbitration agreements under the FAA when statutory claims were at issue.<sup>17</sup>

A different rule, however, applied to arbitration agreements found in collective bargaining agreements. Four years after *Wilko*, the Supreme Court in *Textile Workers Union v. Lincoln Mills*<sup>18</sup> held that federal courts could enforce arbitration clauses contained in such agreements, though the Court relied on

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<sup>12</sup> Pub. L. No. 101-433, 104 Stat. 978 (1990).

<sup>13</sup> See, e.g., *Or. & W. Mortgage Sav. Bank v. Am. Mortgage Co.*, 35 F. 22 (C.C.D. Or. 1888); *Jones v. Harris*, 59 Miss. 214 (1881), *overruled by* *IP Timberlands Operating Co. v. Denmiss Corp.*, 726 So. 2d 96 (Miss. 1998); *Allen v. Watson*, 16 Johns. 205, 208-10 (N.Y. Sup. Ct. 1819); *Kill v. Hollister*, (1746) 95 Eng. Rep. 532 (K.B.); *Vynior's Case*, (1609) 77 Eng. Rep. 595 (K.B.).

<sup>14</sup> United States Arbitration Act, ch. 213, §§ 1-15, 43 Stat. 883-86 (1925) (current version as amended at 9 U.S.C. §§ 1-16 (2000)).

<sup>15</sup> *Wilko v. Swan*, 346 U.S. 427 (1953).

<sup>16</sup> 15 U.S.C. §§ 77a-77aa (2000).

<sup>17</sup> See, e.g., *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 827-28 (2d Cir. 1968).

<sup>18</sup> *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

section 301 of the Labor-Management Relations Act of 1947 ("LMRA"),<sup>19</sup> not the FAA, for this holding.<sup>20</sup> The *Lincoln Mills* Court also interpreted the LMRA as both federalizing the contract law governing enforcement of collective bargaining agreements and as preempting contrary state law.<sup>21</sup> In the 1960 *Steelworkers* Trilogy, the Court strongly endorsed arbitration as a mechanism for resolving collective bargaining disputes, again relying on the LMRA.<sup>22</sup>

In 1964, Congress enacted Title VII, which prohibited employment discrimination on the basis of race, color, religion, sex, and national origin.<sup>23</sup> Subsequent federal statutes extended legal protection to age,<sup>24</sup> pregnancy,<sup>25</sup> and disability.<sup>26</sup> State legislatures passed parallel state statutes,<sup>27</sup> and state courts began to use contract and tort doctrines to soften the common-law rule of employment-at-will.<sup>28</sup> This explosion in employment rights—based on statutory and common-law rights rather than contractual rights conferred by labor agreements—was accompanied by a dramatic increase in litigated employment claims.<sup>29</sup>

An issue soon arose over whether these new rights were arbitrable labor claims or inarbitrable statutory claims. The Supreme Court initially leaned toward the latter, when it ruled in the 1974 case of *Alexander v. Gardner-Denver Co.*<sup>30</sup> that an employee's arbitration of a just-cause claim under a labor agreement did not foreclose subsequent litigation of a statutory discrimination claim based on the same facts. The Court denigrated arbitration as a forum for

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<sup>19</sup> 29 U.S.C. § 185 (2000).

<sup>20</sup> *Textile Workers Union*, 353 U.S. at 458.

<sup>21</sup> *Id.* at 450-51, 456-57; see also *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985) (State law tort claims that are "inextricably intertwined with consideration of the terms of the labor contract" are preempted even if they are superficially labeled as tort claims rather than claims for breach of contract.); *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 26 (1983) (holding that state law claims for breach of a collective bargaining agreement are removable to federal court even if alternative actions are pleaded in the complaint); *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 560 (1968) (holding that section 301 preemption is so expansive that claims based exclusively on state contract law not only are preempted, but also become from their inception federal question claims, and any state law cause of action for violation of a collective bargaining agreement is entirely displaced by Section 301); *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 102-04 (1962) (holding that the Supremacy Clause of the United States Constitution requires this body of federal law to displace any state law regarding the interpretation and enforcement of labor contracts).

<sup>22</sup> *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

<sup>23</sup> 42 U.S.C. § 2000e-2 (2000).

<sup>24</sup> 29 U.S.C. §§ 621-634 (2000).

<sup>25</sup> 42 U.S.C. § 2000e(k).

<sup>26</sup> *Id.* §§ 12101-12213.

<sup>27</sup> R. Bales, *A New Direction for American Labor Law: Individual Autonomy and the Compulsory Arbitration of Individual Employment Rights*, 30 Hous. L. Rev. 1863, 1876-77 (1994).

<sup>28</sup> *Id.* at 1877-78.

<sup>29</sup> See Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 10-12 (1988) (noting that the principal source of worker protection was shifting from contractual rights negotiated through collective bargaining agreements to law-created individual employment rights).

<sup>30</sup> *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

resolving statutory employment claims, citing the informality of arbitral procedures, the lack of labor arbitrators' expertise on issues of substantive law, and the absence of written opinions.<sup>31</sup> However, in three subsequent cases collectively known as the *Mitsubishi Trilogy*,<sup>32</sup> the Court overruled *Wilko* and enforced arbitration agreements covering antitrust, securities, and racketeering laws. The Court declared that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."<sup>33</sup>

The watershed employment arbitration case was the 1991 case of *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>34</sup> in which the Supreme Court held that the FAA permitted an employer to require a non-union employee to arbitrate rather than litigate a federal age discrimination claim pursuant to a pre-dispute arbitration agreement that the employee had been required to sign as a condition of employment. The *Gilmer* Court quoted with approval a statement in *Mitsubishi* that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."<sup>35</sup> The Court stated that objections of unconscionability and procedural unfairness must be addressed on a case-by-case basis, and that employment arbitration agreements would be enforced absent "the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'"<sup>36</sup>

The *Gilmer* Court's enforcement of the arbitration agreement in that case signaled that the arbitral procedures available there met at least the minimum threshold for preserving the "substantive rights afforded by the [employment discrimination] statute"<sup>37</sup> and for overcoming contract claims of unconscionability and procedural unfairness. Beyond such a minimum threshold, however, the Court provided little guidance as to when an employment arbitration agreement would be sufficiently egregious to merit nonenforcement, leaving this to be resolved (often inconsistently) by the lower courts.<sup>38</sup>

### B. Jury Trial Waiver

The right to a jury trial is a fundamental right at the core of American ideals of justice. The trial by jury is so valued because it emphasizes the empowerment of the common person while serving as a check on government and judge.<sup>39</sup> The Supreme Court has recognized that "[t]he trial by jury is justly dear to the American people. It has always been an object of deep inter-

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<sup>31</sup> *Id.* at 56-58.

<sup>32</sup> *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

<sup>33</sup> *Mitsubishi Motors Corp.*, 473 U.S. at 626-27.

<sup>34</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

<sup>35</sup> *Id.* at 26 (quoting *Mitsubishi*, 473 U.S. at 628).

<sup>36</sup> *Id.* at 33 (quoting *Mitsubishi*, 473 U.S. at 627).

<sup>37</sup> *Id.* at 26 (quoting *Mitsubishi*, 473 U.S. at 628).

<sup>38</sup> Bales, *supra* note 9, at 420.

<sup>39</sup> Sternlight, *Mandatory Binding Arbitration*, *supra* note 8, at 672.

est and solicitude, and every encroachment upon it has been watched with great jealousy.”<sup>40</sup>

The Seventh Amendment, ratified in 1791, provides that “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of a jury trial shall be preserved . . . .”<sup>41</sup> The Seventh Amendment is limited to certain types of claims and is therefore narrower in scope than may first appear. Primarily, it only applies to “common law” claims that exceed twenty dollars.<sup>42</sup> Inflation has made the “twenty dollar” requirement obsolete because, although 200 years ago that was a substantial sum of money, today practically every suit exceeds that limit.<sup>43</sup> Also, the Amendment only applies to suits at common law, which means anything that would have required a jury trial in eighteenth century England.<sup>44</sup> Furthermore, the amendment only applies to federal courts and not state courts, and is one of the few amendments not incorporated into the Due Process Clause.<sup>45</sup>

The Seventh Amendment may be waived.<sup>46</sup> However, courts have viewed such waivers with suspicion and place the burden on the party seeking the waiver.<sup>47</sup> To determine if a jury trial waiver is valid, the federal courts have held that such waivers must be knowing, voluntary, and intelligent.<sup>48</sup> While there is no universal test to determine what constitutes a “knowing and voluntary” waiver, the courts generally consider several factors. These factors include the negotiability of the waiver, the conspicuousness of the waiver, the disparity in bargaining power between the two parties, and the degree of professional or business acumen of the party opposing the waiver.<sup>49</sup> When courts apply this analysis, the party waiving her right to a jury trial is afforded a great deal of protection against being coerced, misled, or swindled into waiver. However, it is not the practice of courts to apply this standard to arbitration clauses, but instead to apply contract levels of assent that offer less protection to employees and consumers.<sup>50</sup> The question of which standard should be used is best illustrated by the spirited intellectual debate between Jean R. Sternlight and Stephen J. Ware. Jean Sternlight advocates the use of the knowing and voluntary standard used under the civil jury trial waiver standard, while Stephen Ware is a proponent of the state contract law standard under which arbitration clauses are widely enforced.

Arbitration agreements and jury trial waiver agreements have been addressed differently by the Supreme Court. The principal case for the devel-

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<sup>40</sup> *Chaffeurs Local No. 391 v. Terry*, 494 U.S. 558, 581 (1990) (quoting *Parsons v. Bedford*, 28 U.S. 433, 446 (1830)).

<sup>41</sup> U.S. CONST. amend. VII.

<sup>42</sup> *Id.*

<sup>43</sup> The requirement for federal diversity jurisdiction only applies to suits exceeding a threshold limit of \$75,000. 28 U.S.C. § 1332 (2000).

<sup>44</sup> Sternlight, *Mandatory Binding Arbitration*, *supra* note 8, at 672-73 (citing *Tull v. United States*, 481 U.S. 412, 417-21 (1987)).

<sup>45</sup> *Minn. & St. Louis R.R. v. Bombolis*, 241 U.S. 211, 217 (1916).

<sup>46</sup> Ware, *supra* note 4, at 169.

<sup>47</sup> *Nat'l Acceptance Co. v. MYCA Prods. Inc.*, 381 F. Supp. 269, 270-71 (W.D. Pa. 1974).

<sup>48</sup> Sternlight, *The Rise and Spread*, *supra* note 8, at 22.

<sup>49</sup> *Id.*

<sup>50</sup> *See* 9 U.S.C. § 2 (2000).



opment of the jury trial waiver standard is the criminal case *Johnson v. Zerbst*, in which the Supreme Court stated that “[a] waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege”<sup>51</sup> and held that a defendant who failed to ask the court to appoint counsel and who stated that he was ready to proceed to trial had not necessarily waived his right to counsel.<sup>52</sup> Later, in *Brady v. United States*, the Court noted that “[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.”<sup>53</sup> However, courts have not applied the principles of *Johnson* and *Brady* consistently.<sup>54</sup> While courts have recognized *Johnson* “as a framework for establishing the criteria by which criminal law waivers must be judged,”<sup>55</sup> the rules of criminal procedure also allow for waiver of other constitutional rights without any knowledge or intent.<sup>56</sup>

Knowing waiver is generally required in the criminal context but seldom is required in the civil context.<sup>57</sup> However, some scholars urge that the criminal jury trial waiver should be applied in the civil jury trial waiver context.<sup>58</sup> Two cases provide advocates of knowing consent with precedent from which to argue that the *Johnson* framework should be applied to the context of civil jury waiver. First, in *D.H. Overmyer Co. v. Frick Co.*, the Supreme Court examined a provision contained in a contract between two corporations in which due process rights were waived.<sup>59</sup> The Court found it unnecessary to determine whether the standard for waiver should be the same as that of a criminal proceeding because the agreement already satisfied the knowing standard.<sup>60</sup> In a criminal proceeding, the waiver of the right to a jury trial must be “voluntary, knowing, and intelligently made,”<sup>61</sup> and in *Overmyer* the Court found that the waiver was fully negotiated, specifically bargained for, drafted by counsel, and fully understood by both parties.<sup>62</sup>

The second case supporting the argument that knowing consent should be required in the civil waiver forum is *Fuentes v. Shevin*.<sup>63</sup> In *Fuentes*, the Court

<sup>51</sup> *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

<sup>52</sup> *Id.* at 468-69.

<sup>53</sup> *Brady v. United States*, 397 U.S. 742, 748 (1970).

<sup>54</sup> Ware, *supra* note 4, at 181.

<sup>55</sup> Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478, 491 (1981).

<sup>56</sup> Ware, *supra* note 4, at 181 (citing Sternlight, *Mandatory Binding Arbitration*, *supra* note 8, at 709).

<sup>57</sup> *Id.*

<sup>58</sup> Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration*, 72 TUL. L. REV. 1 (1997); see also Eduard A. Lopez, *Mandatory Arbitration of Employment Discrimination Claims: Some Alternative Grounds for Lai, Duffield and Rosenberg*, 4 EMP. RTS. & EMP. POL'Y J. 1, 30 (2000) (“Application of such a standard to a waiver of the right to jury trial in a civil action is consistent with Supreme Court declarations that the Seventh Amendment right is a ‘fundamental guaranty of the rights and liberties of the people’ and that ‘every reasonable presumption should be indulged against its waiver.’”) (quoting *Hodges v. Easton*, 106 U.S. 408, 412 (1882))).

<sup>59</sup> *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972).

<sup>60</sup> *Id.* at 185-86.

<sup>61</sup> *Id.* at 185.

<sup>62</sup> *Id.* at 184-86.

<sup>63</sup> *Fuentes v. Shevin*, 407 U.S. 67 (1972).

again declined to address whether a "knowing and voluntary" standard applies, but found the agreement to arbitrate unenforceable on grounds that it was not "clear."<sup>64</sup> The plaintiff in *Fuentes* purchased household appliances pursuant to an installment agreement. The plaintiff missed a payment and the defendant repossessed. When the plaintiff challenged the repossession on due process grounds, the defendant argued that a clause in the installment agreement had waived her due process rights. The Supreme Court, however, disagreed, finding no waiver.<sup>65</sup> The Court distinguished this case from *Overmyer* on the basis that the difference in bargaining power disparately favored the seller, there were no negotiated terms, the waiver was a necessary condition of the sale, and there was no evidence that the purchaser was actually placed on notice of the waiver or understood its significance.<sup>66</sup>

These cases together demonstrate the Court's awareness that the enforcement of contracts containing civil waiver agreements must be balanced by taking into account the broad range of fora in which waiver agreements are imposed and the various levels of party intelligence and bargaining power. While the cases do not involve arbitration agreements, they do involve contracts between two parties in which a specific clause waives the rights of the signee. Arbitration agreements often offend basic notions of fairness and cause unknowing waiver of rights in the same way that the agreement in *Fuentes* did by insufficient clarity. The Court stopped its analysis after determining that the agreement was ambiguous.<sup>67</sup> However, there are some indications in *Fuentes* that had the agreement been more clearly drafted, the Court might have scrutinized the issues of involuntariness and unintelligent waiver.<sup>68</sup> Some scholars urge that the Court's analysis, which seems to require civil waiver agreements be fair, should be extended to arbitration agreements.<sup>69</sup>

Jean Sternlight has argued that in *Overmyer* and *Fuentes*, the Court implicitly adopted a test for whether a party has contractually waived the jury trial right without having sufficient notice or understanding of the waiver clause.<sup>70</sup> This four-factor test considers: (1) the visibility and clarity of the waiver provision; (2) the relative knowledge and economic power of the parties; (3) the degree of voluntariness of the purported agreement; and (4) the substantive fairness of the purported agreement.<sup>71</sup> Furthermore, the courts

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<sup>64</sup> *Id.* at 95.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Sternlight, *supra* note 58, at 57. Other proponents of this view set out the factors in a slightly different manner. See Lopez, *supra* note 58, at 30-33 (Prof. Lopez states that "[u]nder the test, courts examine whether contract terms were subject to negotiation, whether there exists a great disparity in bargaining power between the parties, the business acumen of the party opposing the waiver, and the conspicuousness of the jury waiver provision." He further argues that, "[u]nder that test, it appears that most mandatory arbitration agreements between employers and employees will be found unenforceable, because most employment relationships involve a vast disparity in bargaining power, most employment contracts are not negotiated, many if not most arbitration clauses in employment contracts are not conspicuous, and most employees do not possess a high degree of business acumen.").

<sup>70</sup> Sternlight, *supra* note 58, at 57.

<sup>71</sup> *Id.* at 57-58.

place the burden of proof on those parties asserting that the jury trial right has been waived.<sup>72</sup>

Sternlight argues that "[t]his four-factor test is not only supported by precedent but also desirable as a matter of policy to protect against the inappropriate waiver of constitutional rights."<sup>73</sup> However, Sternlight admits that simply requiring that agreements be "clear" and entered into free of duress is not practical due to high transaction costs and the fact that many people will not read or comprehend the agreement regardless of its clarity or level of duress.<sup>74</sup> Sternlight suggests that it is appropriate for courts to "take into account these real-world problems by determining the relative knowledge and power of the parties when considering whether an arbitration clause is sufficiently clear."<sup>75</sup> The purpose of applying this standard is to prevent parties from unwittingly entering into arbitration agreements that are so unfair that no rational person would agree to the terms.<sup>76</sup>

But determining fairness under the jury trial waiver standard requires courts to weigh the knowledge and intelligence of the consumer or employee against the substantive and procedural fairness of the arbitration agreement. This leaves companies without any specific guidelines to follow to ensure enforcement of an arbitration agreement. It also gives courts too much discretion in determining the competence of the employee. Arbitration agreements should be upheld when entered into by competent, knowledgeable parties, but not enforced when a party was unaware of the agreement or was not given an opportunity to fully understand the consequences. Leaving the court to determine the competence of a party opposed to the enforcement of an arbitration agreement will lead to inconsistent results because parties will have a tendency to be untruthful about their competence and courts may simply not believe those who truly did not know or understand what they signed.

Others argue that the *Fuentes* and *Overmyer* holdings are based on dated law and that the Supreme Court would rule differently on similar facts today.<sup>77</sup> Only two years after *Fuentes*, the Supreme Court suggested in *Mitchell v. W.T. Grant Co.*<sup>78</sup> that the contract at issue, despite its take-it-or-leave-it nature, waived due process rights the debtor would have retained.<sup>79</sup> *Mitchell* seems to stand for the notion that contractual waivers of due process rights would not be governed by special default rules or limited to sophisticated parties.<sup>80</sup> Regardless of the practicability of the *Overmyer* and *Fuentes* four-factor test, it appears that the Court would no longer require knowing consent but would only apply contract standards of assent.

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<sup>72</sup> Sternlight, *The Rise and Spread*, *supra* note 8, at 22.

<sup>73</sup> Sternlight, *supra* note 58, at 58.

<sup>74</sup> *Id.* at 58-59.

<sup>75</sup> *Id.* at 59.

<sup>76</sup> *Id.*

<sup>77</sup> Ware, *supra* note 4, at 187-88.

<sup>78</sup> *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974).

<sup>79</sup> Ware, *supra* note 4, at 185.

<sup>80</sup> G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 431, 477-78 (1993).

### C. Arbitral Contractualism

Since the FAA was enacted in 1925, the courts have become more willing to enforce mandatory arbitration agreements by the same standards as any other contract. This trend derives from section 2 of the FAA, which provides that contracts to arbitrate shall be enforceable on any grounds “as exist at law or in equity for the revocation of any contract.”<sup>81</sup> This language places arbitration agreements on the same footing as any other contract by reserving the power of the states to apply state contract law to such agreements. As the Supreme Court explained in *Doctor’s Associates, Inc. v. Casarotto*, applicable contract defenses, which include fraud, duress, coercion, or unconscionability, may be applied in determining the enforceability of arbitration agreements without violating section 2.<sup>82</sup> However, courts may not invalidate agreements under state laws that single out or are applicable only to arbitration agreements. By enacting section 2, Congress precluded the states from isolating arbitration agreements for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts.<sup>83</sup>

This doctrine is at the center of the debate over the level of notice or consent required to bind an individual to an arbitration provision because the FAA mandates that enforcement of arbitration provisions must turn on contract standards of consent.<sup>84</sup> This level of consent is significantly lower than the “knowing and voluntary” consent standard required for waiver under the jury trial standard examined above. Under contract law, formation of a contract does not require mutual assent but only mutual manifestations of assent.<sup>85</sup> This standard offers much less protection to the unwary consumer or prospective employee because it permits companies to use standardized boilerplate and form contracts to show consent based merely on a signature or mark and not on a showing of mutual understanding or even knowledge of the contract provisions.

There are two parts of arbitral contractualism that go beyond section 2 in requiring the use of state contract law to determine enforceability of arbitration agreements: the doctrines of preemption and separability.<sup>86</sup> In a series of cases that begin with the 1984 decision of *Southland Corp. v. Keating*,<sup>87</sup> the Supreme Court interpreted section 2 to mean that state laws singling out arbitration agreements for disfavored treatment are preempted by the FAA, whereas state laws governing contracts generally are not.<sup>88</sup> In *Southland*, a California statute required jury trials for franchisor-franchisee disputes, but the Supreme Court struck down the statute and held that “[i]n enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims

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<sup>81</sup> 9 U.S.C. § 2 (2000).

<sup>82</sup> *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996).

<sup>83</sup> *Id.*

<sup>84</sup> *Ware*, *supra* note 4, at 171.

<sup>85</sup> *Id.*

<sup>86</sup> *Bales*, *supra* note 9, at 422-23, 426.

<sup>87</sup> *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

<sup>88</sup> *See, e.g., Casarotto*, 517 U.S. at 686; *see also* Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 408 (2004).

which the contracting parties agreed to resolve by arbitration.”<sup>89</sup> This preemption doctrine essentially removes any power the states would otherwise have to single out arbitration contracts for “inferior treatment.”

The second doctrine is derived from section 4 of the FAA and is known as the separability doctrine.<sup>90</sup> Section 4 permits a party to obtain specific enforcement of an arbitration agreement by a federal court that would have had jurisdiction over the underlying dispute (e.g., federal question jurisdiction created by a Title VII employment discrimination claim).<sup>91</sup> Section 4 directs that the court “upon being satisfied that the making of the agreement for arbitration . . . is not in issue . . . shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.”<sup>92</sup> Section 3 similarly requires a court to stay legal proceedings to permit specific enforcement of enforceable arbitration agreements.<sup>93</sup>

In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, the Supreme Court held that section 4 of the FAA required arbitration agreements to be viewed as two separate contracts.<sup>94</sup> These two separate contracts consisted of the arbitration contract and the broader terms of the contract, known as the “container” contract. The Court determined that enforceability of the “container” contract should be determined by the arbitrators and the arbitration contract should be determined by the courts.<sup>95</sup> This doctrine, much like the preemption doctrine, removes power from the states and parties and reserves the enforcement of arbitration agreements to the courts so they can protect and further promulgate the judicial acceptance of arbitration under the FAA.

### III. CURRENT STANDARDS

Because enforcement of arbitration agreements has been reserved to the states by section 2 of the FAA,<sup>96</sup> the state courts have used different standards in determining whether the parties to the agreement have sufficient notice of the terms to effectively waive their rights to a jury trial. State contract law also determines the level of notice and consent required to bind a party contractually to an arbitration agreement.<sup>97</sup> While few courts have addressed arbitration agreements under anything other than state contract law, employee and consumer advocates argue that the other standards offer more protection of constitutional rights and should therefore be incorporated into the FAA. However, each of these other standards also has weaknesses when applied in the context of arbitration agreements.

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<sup>89</sup> *Southland Corp.*, 465 U.S. at 10.

<sup>90</sup> 9 U.S.C. § 4 (2000).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> 9 U.S.C. § 3.

<sup>94</sup> *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403 (1967).

<sup>95</sup> *Id.* at 403-04.

<sup>96</sup> 9 U.S.C. § 2.

<sup>97</sup> See *supra* notes 46-50 and accompanying text.

A. *Knowing and Voluntary Standard*

The few courts that have applied the knowing and voluntary standard have not used precisely the same language or factors, but all return to the basic sufficient notice question: Was the employee's or consumer's waiver knowing and voluntary? This standard is very similar to the jury trial waiver standard and provides employees and consumers a similarly high degree of protection. In *Alexander v. Gardner-Denver Co.*, the Supreme Court stated in a footnote that "[i]n determining the effectiveness of any such waiver, a court would have to determine at the outset that the employee's consent to the settlement was voluntary and knowing."<sup>98</sup> (This dicta was intended to address the enforceability of an employee's post-dispute waiver of Title VII rights.<sup>99</sup>) One problem is that the Supreme Court failed to define "knowing and voluntary." Rather, the Court produced a standard that only provides a description of the level of notice an employee must have at the contracting stage.

Although the language used by courts applying the knowing and voluntary standard varies slightly, there are two components of the knowledge requirement: (1) what information the employee or consumer must know, and (2) to what extent the employee or consumer must know, comprehend, and understand that information.<sup>100</sup> In *Prudential Insurance Co. of America v. Lai*, applicants for jobs in the securities industry were told that they were signing up for a pre-employment test; the employer directed the applicants to sign in the relevant place without giving the applicants an opportunity to read the forms.<sup>101</sup> When the employees sued alleging rape, harassment, and sexual abuse, the district court compelled arbitration based on the forms.<sup>102</sup> The employees appealed, arguing they were unaware they signed any document that contained an arbitration clause and were in no other way on notice that they were agreeing to forego their rights to a jury trial.<sup>103</sup> The Ninth Circuit looked to the Supreme Court's decision in *Gilmer* and held that employees cannot be bound by an agreement to arbitrate unless it was entered into knowingly.<sup>104</sup>

The court examined the language of the agreement and determined that because the agreement did not describe the types of claims subject to arbitration, the agreement could not have been entered into knowingly.<sup>105</sup> Courts taking this approach typically consider any actual negotiations, whether the clause was presented on a take-it-or-leave-it basis, the conspicuousness of the clause, the disparity in bargaining power between the parties, and the business acumen or sophistication of the parties.<sup>106</sup>

Nonetheless, this standard fails to delineate how far courts can go to ensure knowing and voluntary consent. This is because terms themselves are extremely vague. "Knowing" may simply mean "deliberate or conscious" or it

<sup>98</sup> *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974).

<sup>99</sup> *Makins v. District of Columbia*, 277 F.3d 544, 547 (D.C. Cir. 2002).

<sup>100</sup> Jessica Wilen Berg, *Understanding Waiver*, 40 HOUS. L. REV. 281, 314 (2003).

<sup>101</sup> *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1301 (9th Cir. 1994).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 1303.

<sup>104</sup> *Id.* at 1304.

<sup>105</sup> *Id.* at 1305.

<sup>106</sup> Sternlight, *Mandatory Binding Arbitration*, *supra* note 8, at 680-81.

can mean “well-informed”; notice may be either actual or constructive.<sup>107</sup> Others have said that knowledge requires both understanding of the current situation as well as understanding of the consequences of different decisions.<sup>108</sup> Notice and consent are two conjoining elements of knowledge: A party normally cannot consent to a contract term of which the party was not given notice.<sup>109</sup> The FAA section 3 requires courts to stay judicial proceedings for “any issue referable to arbitration under an agreement in writing . . . .”<sup>110</sup> Courts consistently have held that while the FAA requires a writing, “it does not require [that the writing] be signed” by the parties.<sup>111</sup> Thus, it is usually sufficient for the party seeking to compel arbitration to show that the other party received a written copy of the arbitration agreement.

In the employment context, this means that an arbitration contract is formed when an employer notifies an employee in writing that continued employment will constitute assent to an arbitration agreement, and the employee continues employment.<sup>112</sup> The argument for enforcement is strongest when the employer can show that the employee had actual knowledge that she was agreeing to arbitration in lieu of litigation.<sup>113</sup> A prudent employer wishing to implement an employment arbitration policy will give an employee a copy of a clearly-drafted arbitration policy several days ahead of time, give the employee an opportunity to consult an attorney,<sup>114</sup> and then have the employee sign an acknowledgment stating that she has received and read the policy and that she understands and agrees to it.<sup>115</sup> Under these circumstances, courts are likely to enforce the arbitration agreement even if the employee later claims she lacked actual knowledge, such as if she signed the agreement without bothering to read its contents.<sup>116</sup> However, not all employers take such pains to ensure knowledgeable consent, and often courts do not require it. The

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<sup>107</sup> Daniel P. O’Gorman, *A State of Disarray: The “Knowing and Voluntary” Standard for Releasing Claims Under Title VII of the Civil Rights Act of 1964*, 8 U. PA. J. LAB. & EMP. L. 73, 82 (2005).

<sup>108</sup> Berg, *supra* note 100, at 314 & n.162.

<sup>109</sup> See, e.g., *Campbell v. Gen. Dynamics Gov’t Sys. Corp.*, 321 F. Supp. 2d 142, 147 n.3 (D. Mass. 2004) (“[A]n employee’s knowledge of the [employer’s] offer is obviously a necessity for the inference of acceptance to hold.”).

<sup>110</sup> 9 U.S.C. § 3 (2000).

<sup>111</sup> See, e.g., *Tinder v. Pinkerton Sec.*, 305 F.3d 728, 736 (7th Cir. 2002) (citing *Valero Refining, Inc. v. M/T Lauberhorn*, 813 F.2d 60, 64 (5th Cir. 1987)).

<sup>112</sup> See *May v. Higbee Co.*, 372 F.3d 757, 764 (5th Cir. 2004) (citing numerous cases). *But cf. Melena v. Anheuser-Busch, Inc.*, 816 N.E.2d 826, 833-34 (Ill. App. Ct. 2004), *rev’d*, 847 N.E.2d 99 (Ill. 2006) (holding that arbitration agreements presented to employees which are a condition of continued employment are not “voluntary” from the perspective of employees, and therefore are unenforceable).

<sup>113</sup> *Campbell*, 321 F. Supp. 2d at 147 n.3.

<sup>114</sup> See, e.g., *Walker v. Ryan’s Family Steak Houses, Inc.*, 400 F.3d 370, 381, 384 (6th Cir. 2005) (refusing to enforce arbitration agreement that recited that employees had the right to consult an attorney, because “in reality, they had no opportunity to exercise that right because they had to sign the agreements on the spot”).

<sup>115</sup> See, e.g., *Pennington v. Frisch’s Rests., Inc.*, 147 F. App’x 463, 465 (6th Cir. 2005) (enforcing employment arbitration agreements where employees signed a form acknowledging that they had “received, read, and underst[ood]” the agreements).

<sup>116</sup> *Campbell*, 321 F. Supp. 2d at 147.

same is true in the consumer context, where companies often make little effort to ensure that consumers understand that they are agreeing to arbitration.

The “voluntary” standard is equally ambiguous. The term itself is difficult to define because it is related to obscurities such as “free-will” and “free-choice,” both of which have been the subject of judicial debate for centuries.<sup>117</sup> Few would doubt that an average employee presented by her employer with an employment arbitration agreement on a “take-it-or-be-fired” basis faces substantial economic pressure to sign the agreement.<sup>118</sup> The same is true of consumers because many products and services are impossible to obtain without agreeing to arbitration. Some courts have concluded from this that pre-dispute employment and consumer arbitration agreements are not voluntary and therefore are unenforceable.<sup>119</sup> However, employees must accept on a “take-it-or-be-fired” basis a substantial number of other employment terms, such as rate-of-pay and work-hours, and consumers likewise must accept a plethora of other terms along with the arbitration agreement.<sup>120</sup> A court refusing to enforce arbitration agreements but not other terms or conditions of employment or purchase, on the ground that economic coercion makes the agreements involuntary, runs afoul of the rule of FAA preemption that state law must treat arbitration agreements no worse than other contractual agreements.<sup>121</sup> If “voluntary” means “free from economic pressure,” then the voluntariness requirement is preempted by the FAA; if “voluntary” means something less, then it provides considerably less protection for employees and consumers than most advocates of the “knowing and voluntary” standard would prefer.

Although the *Lai* court primarily relied on *Gilmer* and the knowing and voluntary standard, it also used the “where appropriate” standard of the Civil Rights Act of 1991 to reinforce its holding due to the statutory nature of the claims.<sup>122</sup> However, it is possible that even the *Lai* court determined its use of the knowing and voluntary standard required the reinforcement of another standard that incorporates similar language.<sup>123</sup>

#### B. “Where Appropriate” Standard

The “where appropriate” standard derives its name from the language of section 118 of the Civil Rights Act of 1991 (“CRA”), which states, “[w]here appropriate and to the extent authorized by law . . . arbitration[ ] is encouraged

<sup>117</sup> O’Gorman, *supra* note 107, at 82-83.

<sup>118</sup> See David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 58.

<sup>119</sup> See, e.g., *Melena v. Anheuser-Busch, Inc.*, 816 N.E.2d 826, 833-34 (Ill. App. Ct. 2004), *rev’d*, 847 N.E.2d 99 (Ill. 2006); see also *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 893 (9th Cir. 2002) (holding that pre-dispute arbitration agreement was procedurally unconscionable because it was a prerequisite for employment).

<sup>120</sup> LAURA J. COOPER ET AL., *ADR IN THE WORKPLACE* 638 (2d ed. 2005).

<sup>121</sup> See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); Lauri Washington Sawyer, Case Note, *Allied-Bruce Terminix Companies v. Dobson: The Implementation of the Purposes of the Federal Arbitration Act or an Unjustified Intrusion Into State Sovereignty?*, 47 MERCER L. REV. 645 (1996).

<sup>122</sup> *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1304-05 (9th Cir. 1994).

<sup>123</sup> *Id.*



to resolve disputes . . . .”<sup>124</sup> However, a connection between the “where appropriate” standard and the “knowing and voluntary” standard is found in Senator Dole’s comments regarding the 1991 CRA section 118 in which he stated that the arbitration provision encourages arbitration only “where the parties knowingly and voluntarily elect to use these methods.”<sup>125</sup> The Senator’s comments do not explain how the standard should be applied.

The First Circuit applied the “where appropriate” standard in *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*<sup>126</sup> In *Rosenberg*, the plaintiff was required to sign a U-4 form, a securities exchange registration form containing a mandatory arbitration clause, as a prerequisite to employment.<sup>127</sup> The court held that the enforcement of the agreement was inappropriate because the employer never provided the plaintiff with the rules or procedure of arbitration as provided by the agreement.<sup>128</sup>

The *Rosenberg* holding demonstrates the broad discretion this standard gives courts as to what is or is not appropriate. The plaintiff in *Rosenberg* was aware that she had signed an agreement to arbitrate but was not provided with the rules of arbitration as required by the agreement.<sup>129</sup> Had the court applied the knowing and voluntary standard, the court may have enforced the agreement because the employee knew that she had signed an agreement to arbitrate. *Rosenberg* puts the burden on the employer to ensure that the employee is properly informed and on notice regarding the arbitration agreement, though the language of the standard itself does not require this.<sup>130</sup> Even the *Rosenberg* court acknowledged that the “where appropriate” standard is not expressed in the text of the FAA or at common law.<sup>131</sup>

Besides the fact that the 1991 CRA only applies to statutory employment claims, the problem with the standard as applied to arbitration agreements is that it gives too much discretion to courts in determining what constitutes an “appropriate” situation to enforce arbitration.<sup>132</sup> Widespread application of the “appropriate” standard in determining enforceability of arbitration agreements would lead to inconsistent results. Perhaps for that reason, few courts have adopted it.

### C. State Contract Law

By far the most common source of authority courts apply in determining the enforceability of arbitration agreements is the contract law of the state in which the dispute arose. For example, in *Cooper v. MRM Investment Co.*, the plaintiff worked as a restaurant manager.<sup>133</sup> She sued, alleging sexual harass-

<sup>124</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081.

<sup>125</sup> 137 CONG. REC. S15472, S15478 (daily ed. Oct. 30, 1991) (statement of Sen. Dole).

<sup>126</sup> *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999).

<sup>127</sup> *Id.* at 3.

<sup>128</sup> *Id.* at 19-20.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 18.

<sup>131</sup> *Id.* at 19.

<sup>132</sup> See Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081.

<sup>133</sup> *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 497 (6th Cir. 2004).

ment and constructive discharge.<sup>134</sup> When the employer filed a motion to compel arbitration based on a predispute arbitration agreement, the district court dismissed the motion in part because the arbitration agreement did not explicitly state that the employee was surrendering her right to a jury trial.<sup>135</sup> The Sixth Circuit reversed, rejecting the employee's argument that an arbitration agreement must contain an express waiver.<sup>136</sup> The court reasoned that "the loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate."<sup>137</sup>

The Cooper decision demonstrates the shift from the knowing and voluntary standard and the protection it affords employees and consumers to the contractual standard that favors the drafter of the agreement. The Cooper court rejected the knowing and voluntary standard but at the same time found that it is consistent with the contractual standard because, while the knowing and voluntary standard requires the agreement to be "clear," contract law focuses on the "clear and obvious consequence."<sup>138</sup> The court tried to draw an analogy between a "clear" or express waiver and the allegedly obvious consequence that an agreement to arbitrate precludes a jury trial.<sup>139</sup>

The problem, however, is the court's assumption that a person signing an arbitration agreement necessarily understands its consequences. This requires the employee or consumer to understand what arbitration is and the basic substantive and procedural differences between arbitration and a jury trial. However, it is unlikely that a person holding an entry level position in (for example) the fast-food industry will clearly understand the "obvious consequences" of arbitration,<sup>140</sup> which usually include curtailed discovery, higher forum fees, and no jury trials.

While it is improbable that most employees or consumers fully comprehend the consequences of signing an arbitration agreement, another common problem is the lack of notice that the employee or consumer has that she signed or agreed to an arbitration agreement.<sup>141</sup> Arbitration agreements are often con-

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 506.

<sup>137</sup> *Id.* (quoting *Burden v. Check Into Cash of Ky., LLC*, 267 F.3d 483, 492 (6th Cir. 2001)).

<sup>138</sup> *Id.* at 508.

<sup>139</sup> *Id.*

<sup>140</sup> See *Penn v. Ryan's Family Steakhouses, Inc.*, 95 F. Supp. 2d 940, 954-55 (N.D. Ind. 2000) (In holding that arbitration agreements must be entered into knowingly and voluntarily to comply with the ADA, the court stated that it "is hard-pressed to believe that the average job applicant at Ryan's competing for a job washing dishes or waiting tables could possibly pick-up on the intricacies of the Agreement and understand the contractual scenario involved, and then boldly pose questions to the manager conducting his or her interview or consult with an attorney before signing.").

<sup>141</sup> See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997). The Seventh Circuit enforced an arbitration agreement contained in a warranty booklet that accompanied the computer sent to the consumer. No signature was asked for or obtained, but the court upheld the clause because the consumer could have read the clause and returned the computer if she did not accept the terms.

tained in long and complex boilerplate documents,<sup>142</sup> and consumers and employees often do not have time or feel pressured into skimming or not reading the contract before signing and therefore are not aware of the arbitration agreement contained in the contract.<sup>143</sup> Courts often are willing to enforce contracts where the arbitration clause was in small type,<sup>144</sup> where the arbitration clause did not even mention arbitration but only incorporated another document by reference,<sup>145</sup> and where the arbitration agreement was imposed retroactively.<sup>146</sup> Furthermore, arbitration agreements often are presented by salespersons or supervisors who either do not understand the agreement themselves or do not have the time or desire to explain the terms to the non-drafting party.<sup>147</sup> The result is that it is common for courts to compel arbitration against the weaker, non-drafting party who either did not know of the clause or was not given the opportunity to consider the terms and ask questions.

The problems with the contract law standard result from the rigid objectivity under which arbitration agreements are examined.<sup>148</sup> The standard does not take into account the reality that form employment arbitration agreements are generally drafted by highly-educated lawyers and presented to job applicants or consumers by supervisors or salespersons who are coached by the drafting party and who do not explain the terms but only encourage a rushed assent. Not only does the drafting party have ultimate control over the terms, but the supervisors and salespersons who present the contracts often have their own agenda, possibly the collection of a sales commission or not having to continue searching for needed job applicants, which may encourage them to present an overly optimistic or misleading depiction of the contract to the weaker party.<sup>149</sup>

<sup>142</sup> See *Painewebber Inc. v. Chase Manhattan Private Bank*, 260 F.3d 453, 456 (5th Cir. 2001); *Howell v. NHC Healthcare-Fort Sanders, Inc.*, 109 S.W.3d 731, 734 (Tenn. Ct. App. 2003).

<sup>143</sup> See *Kelly v. UHC Mgmt. Co.*, 967 F. Supp. 1240, 1248 (N.D. Ala. 1997) (The employee was unaware that she signed an arbitration agreement, claiming "I never had an opportunity to read the Code of Conduct form before I signed it. . . . Moreover, I felt pressured to sign the form on the spot because my supervisor demanded that I sign it immediately.").

<sup>144</sup> See *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 176-77, 182-84 (3d Cir. 1999) (enforcing a consumer arbitration agreement contained in small print on the back and bottom of a form contract); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 834-35 (8th Cir. 1997) (enforcing an employee arbitration agreement that was contained on page thirty-one of an employee handbook).

<sup>145</sup> See *R.J. O'Brien & Assoc., Inc. v. Pipkin*, 64 F.3d 257, 260 (7th Cir. 1995) (The commodity forms did not specifically mention arbitration, but the court enforced the arbitration award because, under state contract law, "[a] contract . . . need not contain an explicit arbitration clause if it validly incorporates by reference an arbitration clause in another document.").

<sup>146</sup> See *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 320 (9th Cir. 1996) (Despite the fact that the NASD rules did not require or mention arbitration when the employee signed the contract, the court enforced arbitration against the employee because the NASD rules may "be amended from time to time.").

<sup>147</sup> See *Painewebber Inc.*, 260 F.3d at 456; *Howell*, 109 S.W.3d at 732.

<sup>148</sup> RESTATEMENT (SECOND) OF CONTRACTS § 211 & cmt. b (1981).

<sup>149</sup> See *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 287 (9th Cir. 1998) (Enforcing an arbitration agreement against a consumer, the court stated that parties to a contract, dealing at an arms length, are not under a duty to explain the terms of the contract. Furthermore, the court stated that the consumer's reliance on the false statement that the contract "did not compromise any of [their] rights" was not reasonable.).

Until a new standard is devised, courts will continue to permit companies to make misleading statements and encourage assent without reading or opportunity for inquiry and then hold the weaker parties responsible for relying on the word of the stronger party.

Although the contract standard allows an employee to claim fraud, duress, unconscionability, or lack of mutual assent, the employee's right to a jury trial is less protected than under the other standards because under contract law each party bears the burden of his or her own ignorance. This places many job seekers who lack even a high school education on the same footing as the highly-educated employer and the highly-educated lawyers who drafted the arbitration agreement.<sup>150</sup> Not only are many job seekers poorly-educated about arbitration, they are often in financial need and primarily concerned with getting a job so they can pay rent and feed their family. It is unfair that thousands of these individuals are permitted to trade their right to a jury trial for minimum wage, at-will employment without fully understanding the consequences of their actions. Something more is needed to ensure justice for the average American worker.

#### IV. THE OWBPA ALTERNATIVE

None of the tests already discussed appear to strike an appropriate balance between the importance of protecting the jury trial rights conferred by the Seventh Amendment and the preference for enforcing arbitration agreements. The standard addressed in this Part has been applied in a context similar to mandatory arbitration agreements, and with modification could become a useful standard by which companies can ensure that arbitration agreements will be enforced and courts can ensure fairness to both parties.

##### A. *The OWBPA Standard*

The Older Workers Benefit Protection Act is the only antidiscrimination legislation explicitly requiring that waivers be knowing and voluntary.<sup>151</sup> This heightened standard was enacted in response to the common practice of

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<sup>150</sup> See *Parsley v. Terminix Int'l Co.*, No. C-3-97-394, 1998 U.S. Dist. Lexis 22891, at \*15 (S.D. Ohio Sept. 15, 1998) (enforcing an arbitration agreement against a "sixty-three year old woman with little education and little or no experience in similar transactions").

<sup>151</sup> Section 201 of the OWBPA adds subsection (f)(1) to section 7 of the ADEA and provides:

(f)(1) An individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum—

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this Act;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

employers offering older employees early retirement severance packages.<sup>152</sup> A condition of these packages was the employee's waiver of any past age discrimination claims against the employer.<sup>153</sup> However, the severances—and the waivers—often were coercive, especially when juxtaposed with the looming specter of a mass layoff. Employees presented with these severances and waivers believed, often justifiably, that the only alternative to acceptance was discharge.<sup>154</sup> Once the employee accepted, the waiver effectively terminated any inquiry as to whether employees had been victims of unlawful discrimination.<sup>155</sup>

The Age Discrimination in Employment Act was passed in 1967 to prohibit age discrimination in the employment context.<sup>156</sup> Section 4(f)(2) of the ADEA provided an exception to the Act's prohibitions on differential treatment of older workers if that treatment occurs as part of a "bona fide employee benefit plan."<sup>157</sup> This exception amounted to an employer's affirmative defense against a charge of discriminatory treatment. The Supreme Court endorsed this view in *Public Employees Retirement System v. Betts* when it determined that section 4(f)(2) required no showing of cost justification for any discriminatory treatment under an allegedly bona fide plan.<sup>158</sup> This rejection of the cost-justification rule meant that employers were now virtually free to discriminate on the basis of age in the area of non-fringe, employee benefits.<sup>159</sup>

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(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired . . . .

Older Workers Benefit Protection Act, Pub. L. No. 101-433, § 201, 104 Stat. 978, 983 (1990) (codified at 29 U.S.C. § 626(f)(1) (2000)).

<sup>152</sup> See H.R. REP. NO. 101-664, at 25 (1990) (Congress noted that employees are frequently laid off due to global competition and mergers and that "[e]mployers know that if hundreds of thousands of employees are simply laid off with no benefits or terminated for cause, the result may be bitterness and lawsuits. Accordingly, employers have come to rely heavily on early retirement and other exit incentive programs to reduce their workforce.").

<sup>153</sup> 1 HOWARD C. EGLIT, AGE DISCRIMINATION § 4.10, at 4-36 (2d ed. 1994).

<sup>154</sup> *Id.* at 4-35 to 4-36.

<sup>155</sup> See H.R. REP. NO. 101-664, at 23 ("[W]orkers are given no reason to suspect age discrimination and often are not even aware of their rights under the ADEA. For them, waiving all rights and claims through a general release effectively chills any meaningful inquiry into whether they are the victims of unlawful age discrimination." "The House and Senate hearing records are replete with evidence of older workers who have been manipulated or coerced into waiving their rights under the ADEA. This evidence, although anecdotal, paints a disturbing picture of waiver practices.").

<sup>156</sup> Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (2000)).

<sup>157</sup> *Id.* § 4(f)(2), 81 Stat. at 603.

<sup>158</sup> *Pub. Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 175 (1989).

<sup>159</sup> David A. Niles, *The Older Workers Benefit Protection Act: Painting Age-Discrimination Law with a Watery Brush*, 40 BUFF. L. REV. 869, 877 (1992).

In 1990, Congress amended the ADEA by adding a provision, now known as the OWBPA, specifically to overturn the *Betts* decision.<sup>160</sup> The purpose of the amendment was to statutorily require adherence to consent and notice standards and to ensure that employee waivers were truly knowing and voluntary.<sup>161</sup>

The OWBPA creates a presumption that a waiver is not knowing and voluntary unless seven requirements are met.<sup>162</sup> However, even the seven requirements are only a threshold matter, and the statute still permits the courts to find the agreement unenforceable even if the seven requirements are met.<sup>163</sup> The requirements are as follows: (1) the waiver must be part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such an individual, or by the average individual eligible to participate; (2) the waiver must specifically refer to rights or claims arising under this Act; (3) the individual must not waive rights or claims that may arise after the date the waiver is executed; (4) the individual must waive rights or claims only in exchange for consideration in addition to anything of value to which the individual is already entitled; (5) the individual must be advised in writing to consult with an attorney prior to executing the agreement; (6) the individual must be given a period of at least twenty-one days within which to consider the agreement; and (7) the agreement must provide that for a period of at least seven days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired.<sup>164</sup>

The application of this test helps ensure that the employee waiving her rights understands exactly what she has done. While several provisions need to be modified or removed to be applicable to employment and consumer arbitration agreements, most of the Act is already well suited for protecting the employee and consumer at the contracting stage. In creating the OWBPA, Congress took into account the diversity of employees' comprehension levels as well as the preference for time to consider and seek counsel regarding the agreement. Furthermore, Congress recognized that employers are primarily concerned with their own interests in drafting waiver clauses and tend to pressure or rush employees into signing them. These are concerns that the current notice tests for consumer and employment minimize or ignore altogether.

### *B. Appropriate Modifications*

While the OWBPA creates a higher standard than the courts currently use in examining mandatory arbitration agreements, there are differences between

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<sup>160</sup> See Older Workers Benefit Protection Act, Pub. L. No. 101-433, § 101, 104 Stat. 978, 978 (1990).

<sup>161</sup> See S. REP. NO. 101-263, at 5 (1990); H.R. REP. NO. 101-664, at 6 (1990) (both stating that the OWBPA was passed to ensure that "older workers are not coerced or manipulated into waiving their rights to seek legal relief under the ADEA").

<sup>162</sup> 29 U.S.C. § 626(f)(1)(A)-(G) (2000).

<sup>163</sup> *Id.* § 626(f)(1) ("[A] waiver may not be considered knowing and voluntary unless at a minimum [the waiver meets certain requirements]."); see also 1 EGLIT, *supra* note 153, § 5.65.

<sup>164</sup> 29 U.S.C. § 626(f)(1)(A)-(G).

the employee retirement plan and arbitration agreement contexts that require some of the OWBPA requirements to be modified to fit the arbitration context.

The first part of the OWBPA standard addresses the complexity of the agreement and the need for the employee to comprehend fully the agreements' terms.<sup>165</sup> This part of the OWBPA standard requires, for example, that the waiver agreement be typed in an easily readable size font, in the waiving party's vernacular language, and that the agreement must be written in layperson's terms rather than lawyer's terms.<sup>166</sup> This requirement provides the basis for sufficient notice to an employee or consumer, and the remaining sections build upon this core requirement of understanding. The section does not require modification to be applicable in the arbitration context because this "understanding requirement" would further the protection of consumers' and employees' rights and ensure enforcement of such agreements.

The second OWBPA requirement limits waiver to include only rights specifically arising under the Act.<sup>167</sup> This requirement narrows the waiver to include only age discrimination claims as opposed to the numerous claims that could arise in the mandatory arbitration context. Employment arbitration agreements usually encompass, at a minimum, all legal claims that an employee might assert against an employer, such as sexual harassment, torts, discrimination, and contract claims; consumer arbitration agreements often are intended to cover not only contract claims, but also claims brought under consumer-protection statutes. In applying the OWBPA to mandatory arbitration agreements, it would be necessary to broaden the standard to include all claims arising under the specific arbitration agreement at issue. While this modification broadens the standard, it also narrows what the parties can claim is covered by the agreement because only claims specifically included under the agreement would be subject to mandatory arbitration. This would not preclude a company from drafting an expansive agreement that would include virtually all claims, but it would require the company to specifically enumerate all claims that the consumer or employee is waiving.<sup>168</sup> This modification enhances employee notice and appropriately places the burden on the company to enumerate the claims subject to arbitration.

The greatest difference between the OWBPA and mandatory arbitration agreements is the third requirement. The OWBPA is concerned with the waiver of *past* claims, while consumer and employment arbitration agreements are designed to be prospective.<sup>169</sup> Through enacting the OWBPA, Congress recognized the need to protect older workers' rights to sue on past claims, but it has not extended that protection to consumers' and employees' rights to sue on

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<sup>165</sup> *Id.* § 626(f)(1)(A).

<sup>166</sup> For cases illustrating these issues, see *supra* notes 109-16.

<sup>167</sup> 29 U.S.C. § 626(f)(1)(B).

<sup>168</sup> This requirement is not contrary to the judicial policy of enforcing arbitration agreements, but only requires that enforcement of arbitration agreements be limited to the explicit terms of the agreement. This is consistent with the contract law principle of determining enforcement based on the "four corners" of the contract.

<sup>169</sup> 29 U.S.C. § 626(f)(1)(C); see also *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 4 (1st Cir. 1999) (providing an example of a prospective waiver provision).

prospective claims.<sup>170</sup> Congress should continue to provide a great amount of protection to older workers, but an equal amount of protection should be provided to individuals who have not yet been wronged. It is inconsistent to provide more protection to someone who has already been discriminated against and therefore has a greater probability of being aware of her cause of action and, on the other hand, less protection to a new employee or consumer who is unaware of what future claims may arise. It would make little sense to apply the third requirement to mandatory arbitration agreements because there are no past claims at the contracting stage. However, while removal of this requirement is an appropriate modification to the standard, its presence in the OWBPA provides even greater weight to the argument that a higher level of protection is necessary in consumer and employment arbitration.

Under the fourth OWBPA requirement, an employee can only waive her right to a jury trial in exchange for consideration that is in addition to any retirement package to which the employee is already entitled.<sup>171</sup> For example, if the employee is already entitled to a retirement package, the employer would have to provide some form of valuable bonus before a court will consider the employees' waiver valid. In the mandatory arbitration realm, most courts have not required additional consideration because the prospective employee is entitled to nothing at the contracting stage. In the view of some states, upon signing the arbitration agreement, the prospective employee is then entitled to employment, which could be considered a form of consideration. However, employment as consideration is illusory because the vast majority of employees signing arbitration agreements are "at-will" employees who can be fired at any time and for any nondiscriminatory reason.

Consideration serves an important function in the OWBPA and should serve a similar function in employment and consumer arbitration: It enhances notice. For example, if an employee receives a twenty-five cent hourly raise or stock options in return for signing an arbitration agreement, that employee is more likely to notice the agreement and consider it carefully. The consideration functions as a signaling device. The FAA should require, as the OWBPA does now, that an at-will employee receive some form of consideration other than at-will employment in return for signing an arbitration agreement.

The fifth requirement of the OWBPA is that the employee must be advised in writing to consult an attorney before executing the agreement.<sup>172</sup> This requirement impresses on the worker the significance of the waiver while ensuring she is at least aware that seeking counsel is a good idea. In the mandatory arbitration context, nearly all employees and consumers are ignorant of the fact that the guidance of legal counsel could be in their best interest. This is largely because companies tend to rush employees and consumers into

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<sup>170</sup> See H.R. REP. NO. 101-664, at 31 (1990) ("[O]lder workers are in an unequal bargaining position when faced with a situation that leaves them very few alternatives. They are often coerced or manipulated into signing waivers as a condition of their participation in exit incentive or early retirement programs.").

<sup>171</sup> 29 U.S.C. § 626(f)(1)(D).

<sup>172</sup> *Id.* § 626(f)(1)(E).



signing without sufficient time to ask questions.<sup>173</sup> While it is likely that many employees and consumers will fail to obtain counsel even after being advised to do so, either because they cannot afford to do so or because they simply choose not to do so, the modest requirement of a writing advising the prospective employee to seek counsel would raise awareness and notice of the waiver.

Awareness of the waiver is most important when the common atmosphere of signing an employment contract is one of pressure mixed with optimism about the new job. The problem is not that prospective employees are all illiterate and need a lawyer to understand the agreement. The problem is that when a manager says "you don't need a lawyer" or "you don't have to read the whole thing because it doesn't affect your rights," a misrepresentation is made to the prospective employee by an authority figure. Not only does the prospective employee want to believe the new boss, but the employee is under pressure not to challenge or contradict her. The prospective employee who has received a written notice advising her or him to seek legal advice, while perhaps unable to afford counsel, would be more likely to seek information through the Internet, the library, or a knowledgeable friend.

The final two requirements of the OWBPA concern the time allowed for consideration and revocation of the waiver agreement.<sup>174</sup> These requirements ensure that the worker has sufficient time to seek counsel and consider the waiver before execution and provides a way out if she later decides against waiver. In the mandatory arbitration context, such rigid requirements would be counterproductive because prospective employees usually have a financially-driven desire to begin work as soon as possible, and employers have a similar desire due to production demands or service quotas. However, even a short time to consider the arbitration agreement would give the prospective employee time to consult an attorney or conduct independent research and would also help alleviate some of the pressure or duress that the prospective employee may encounter when entering into an employment contract.

To accommodate the incentives of both the prospective employee and employer to begin work, a fair compromise would be to allow the employee to begin work while the execution of the arbitration agreement is still pending. It is unlikely that a dispute would arise within the first week of employment, and therefore the employer is not placing itself at grave risk by allowing the employee to consider the agreement for a few days before executing the agreement. While no universal amount of time will suffice for all situations, granting a prospective employee some amount of time to consider the arbitration agreement helps ensure sufficient notice of the arbitration agreement and ensures the employer that the agreement will be enforced.

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<sup>173</sup> See *Kelly v. UHC Mgmt. Co.*, 967 F. Supp. 1240, 1248 (N.D. Ala. 1997) (The employee was unaware that she signed an arbitration agreement, claiming "I never had an opportunity to read the Code of Conduct form before I signed it. . . . Moreover, I felt pressured to sign the form on the spot because my supervisor demanded that I sign it immediately.").

<sup>174</sup> 29 U.S.C. § 626(f)(1)(F)-(G).

### C. *Proposed Amendment*

The FAA should be amended to reflect the recent explosion of the use of mandatory arbitration agreements between parties that are unequal in sophistication and bargaining power. The amendment should not discourage arbitration or reflect negatively upon it but should only go so far as to balance the playing field between highly sophisticated and powerful employers or retailers and the average person applying for a job or purchasing goods or services. The following amendment is an appropriate addition to the end of section 2 of the FAA<sup>175</sup>:

However, if an arbitration agreement is entered into as part of an employment relationship or a consumer transaction, the employee's or consumer's agreement to arbitration must be knowing and voluntary and memorialized by that party's dated signature. A knowing and voluntary waiver will be found to exist where: (1) the waiver clause has been written in a manner calculated to be understood by the waiving party; (2) the waiver clause explicitly states all the claims covered by the arbitration agreement; (3) the waiving party has been provided with the rules and procedures of the arbitration agreement; (4) the waiving party has been advised in writing to consult an attorney; (5) the waiver has been accompanied by consideration that the waiving party understands is being received in return for the surrendering of a right; and (6) the waiving party is given at least seven days after signing the agreement to return the consideration, revoke the agreement, and, if the company has made arbitration a condition of employment or purchase, thereby void the underlying transaction. For purposes of this section a "consumer" is defined as a person who enters into a transaction primarily for personal, family, or household purposes; and this "knowing and voluntary" requirement does not apply to the employment contracts of executive officers.

This amendment has several advantages over the FAA's current section 2 because it offers greater protection to unsophisticated or unsuspecting parties while guaranteeing employers and retailers assurance that the arbitration agreement will be enforced. The amendment offers protection that Congress has already recognized as appropriate in the context of protecting employees from waiver of rights under the OWBPA.<sup>176</sup> Similar to the OWBPA, the proposed standard specifically provides requirements that, if fulfilled, will result in a presumption that the waiver was "knowing and voluntary."

The amendment takes into account the reality that it is common for employees and consumers to contract away their Seventh Amendment right to a jury trial without notice or understanding. The requirements ensure that the waiving party actually knows something about arbitration before assenting to an arbitration clause. It also prevents employers or retailers from misleading the waiving party regarding the nature and consequences of the contract. Furthermore, the requirements are not unduly burdensome on the drafting party but

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<sup>175</sup> 9 U.S.C. § 2 (2000). The section currently reads:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

<sup>176</sup> 29 U.S.C. § 626(f)(1).

only require a small or nominal form of consideration and revision of the contract to reflect the requisite level of clarity. The benefit to the drafting party is the assurance that the contract will be enforced; thus saving the drafting party the expense of litigating the enforceability of the contract.

## V. CONCLUSION

The Seventh Amendment provides each person with a fundamental right to a jury trial that should be protected. The FAA has reversed the judicial hostility towards mandatory arbitration agreements and made it relatively easy for employers and retailers to gain an employee's or consumer's consent to an arbitration agreement without placing the employee or consumer on notice of the agreement. Courts have used various standards in determining the enforceability of arbitration agreements but most, especially those utilizing the majority contract law approach, do not protect the employee's and consumer's rights and often enforce arbitration agreements that employees and consumers do not know they signed. In the context of early retirement packages, the higher standard of the OWBPA more adequately protects employees' rights to pursue claims against their employers, and therefore a similar standard should be used in the mandatory arbitration agreement context. A standard similar to the OWBPA would more adequately protect employees' and consumers' right to a jury trial and benefit employers and retailers by ensuring the enforceability of arbitration agreements. Therefore, Congress should amend the FAA to include higher notice and consent standards in order to ensure that employees and consumers are not subjected to arbitration agreements without sufficient notice.